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PRIZE LAW DURING THE WORLD WAR

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PRIZE LAW DURING THE WORLD WAR

A STUDY OF THE JURISPRUDENCE
OF
THE PRIZE COURTS, 1914-1924

BY
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To

JAMES BROWN SCOTT

whose zeal, devotion and untiring efforts for the advancement of what Sir Robert Phillimore justly called the "noble science" of international law, have made all students his debtors, this work is inscribed by the author as a testimonial of his homage and appreciation.

PREFACE

I have attempted in this work to give a survey of the organization, function and jurisdiction of the Prize Courts during the World War, to analyze the mass of prize jurisprudence, which may be said to constitute the most important contribution of the war to international law, to summarize and compare the interpretation and the conclusions of the Prize Courts of the different countries in which such tribunals were organized and to point out the divergencies of opinion and doctrine which they enunciated upon identical or similar questions.

The preliminary task of procuring the texts of the reported decisions rendered by the Prize Courts was not an easy one, and I have not entirely succeeded in performing it. Unfortunately, in no one of the countries in which the prize jurisdiction was organized does there appear to have been published a complete official collection of the decisions rendered by its Prize Courts. The collections that have been made and published are usually unofficial in character, and with a few relatively unimportant exceptions, they are incomplete. In some countries no decisions at all have been published; in others only those rendered by the Courts of Appeal have been published in collected form; in others they can only be found scattered through the files of the official gazettes, and other government publications.

While the preparation of my treatise was well advanced there appeared the scholarly work of Professor Verzijl of the University of Utrecht, entitled *Le Droit des Prises de la Grande Guerre, Jurisprudence de 1914 et des Années Suivantes en Matière de Prises Maritimes*, which has been of invaluable assistance to me. I am glad to acknowledge my indebtedness to him, especially for his classification of the cases and for the information which his work contains regarding some of the decisions which I was unable to procure.

I desire also to acknowledge my obligation to the Carnegie Endowment for International Peace, which has done so much for

the advancement of the science and the cause of international law, for generous assistance which has enabled me to publish the results of my study.

JAMES WILFORD GARNER.

UNIVERSITY OF ILLINOIS,
DECEMBER, 1926.

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INTRODUCTION

During the World War special prize tribunals were organized, or existing courts designated and authorized to exercise jurisdiction in matters of prize, in Austria-Hungary, Belgium, China, France, Germany, Great Britain, Italy, Japan, Roumania, Russia, Portugal, Siam and Turkey. From first to last these tribunals rendered not less than fifteen hundred reported decisions, besides a large number of other decisions which were never reported.[1] No war of the past ever produced so extensive an output of prize jurisprudence. It deals with every question of international law that had been the subject of adjudication by the Prize Courts during former wars and in many cases old questions were presented under new and sometimes novel forms. Likewise, the Prize Courts were called upon to decide many new questions that had never before been the subject of adjudication, and consequently concerning which there were no exact precedents for the guidance of the courts.

The larger number of the more important reported decisions of the British prize courts may be found in two published collections, both unofficial and both incomplete. The first of these is a collection in three volumes entitled "British and Colonial Prize Cases," edited in succession by E. C. M. Trehern and A. Wallace Grant, English barristers at law. It contains the texts of some 300 decisions which in the opinion of the editors are likely to be of "permanent interest in the law and practice of prize." These include the decisions of various Colonial Courts sitting in prize "in which interesting points have arisen" and also the decisions of the Judicial Committee of the Privy Council in the cases appealed from the Prize Courts. It contains no decisions rendered, however, subsequent to July 1922. The other collection is a publication in ten volumes entitled "Lloyd's Re-

[1] It has been stated that the greater number of cases tried by Sir Samuel Evans, having turned on questions of fact, remain unreported. See Lloyd's *Reports of Prize Cases*, Vol. V, p. VII. While the reported decisions of the Prize Court for Egypt are less than 40 in number, Judge Grain stated in June 1918 that this Court had heard and "adjudicated upon" about 1200 cases in the course of the nearly four years during which it had been sitting. See his statement in the case of *Lützow No. 6, III Brit.* and *Col. Prize Cases*, at p. 338.

ports of Prize Cases," heard before and decided by the Right Honourable Sir Samuel Evans, the Right Honourable Lord Sterndale and the Right Honourable Sir Henry Duke, Presidents, in succession, of the Probate, Divorce and Admiralty Division (1914-1924). They are reprinted from "Lloyd's List," and were edited in turn by John Bridge Aspinall and Edward Louis DeHart. This collection contains the texts of about 360 decisions of the Prize Court at London, of the Judicial Committee (on appeal) and of the Naval Prize Tribunal. It purports to contain all the decisions of the Prize Court at London which are likely to be of "enduring interest," rendered from the beginning of the war down to May 1924. Unlike the first mentioned collection, however, it does not include any of the decisions of the Prize Courts in the dominions, the colonies, the protectorates or India, except those from which appeals were taken to the Judicial Committee. It is, therefore, far from complete. Each collection, it may be observed, contains various decisions not found in the other. Generally, where I have referred to a decision found in both collections, I have, for the convenience of students, cited both. Neither collection, it may be added, contains the decisions rendered by the South African Prize Courts. These decisions, about 65 altogether, have been collected and published in a volume entitled "Cases Decided in the Prize Courts of South Africa," by Messers Juta and Company, Limited, law publishers of Cape Town.

The most important collection of the decisions of the French Prize Council and of the Council of State (on appeal) is that of M. Paul Fauchille, published in two volumes at Paris in 1916 and 1919, respectively, under the title *Jurisprudence Française en Matière de Prises*. This collection contains the texts of about 225 decisions rendered from the outbreak of the war down to the end of the year 1918. Various decisions rendered subsequent to the latter date may be found in the successive issues of the *Revue Générale de Droit International Public*. An official publication issued by the Ministry of Marine in 1916 entitled *Décisions du Conseil des Prises et Décrets Rendus en Conseil d'Etat en Matière des Prises Maritimes* contains the texts of 174 decisions most of which are found in M. Fauchille's collection, but this volume does not appear to have been followed by others containing the decisions rendered subsequent to the year 1916. A complete collection of all the French decisions can only be

found in the *Journal Officiel* in which they were regularly published as they were rendered.

No collection, official or private, of the decisions of the Belgian Prize Council appears to have been published. They appeared, some 22 altogether, however, in the *Moniteur Belge,* for the most part during the months of December, 1919, and January, 1920. Some of the more important of them were also published in the *Revue de Droit International et de Législation Comparée* (Volume 47, No. 1, 1920).

What appears to be a fairly complete collection of the decisions of the Italian Prize Commission, in French translation, is found in a volume entitled *Jurisprudence Italienne en Matière de Prises Maritimes,* by Mms. Paul Fauchille and Jules Basdevant (Paris, 1921). This collection contains 240 decisions rendered between December 1915 and October 31, 1919, together with the texts in French of various Italian decrees and other acts bearing upon the organization and exercise of the prize jurisdiction. The decisions appeared regularly, as rendered, in the Italian *Gazzetta Ufficiale* beginning with the issue of February 9, 1916, and ending with the issue of April 20, 1920.

There is no complete published collection, official or private, of the decisions of the German Prize Courts. Two volumes, however, entitled *Entscheidungen des Oberprisengerichts in Berlin* were published at Berlin in 1918 and 1921, containing the texts of 154 decisions rendered by the Supreme Prize Court (on appeal) from the beginning of the war down to February 12, 1920. But it does not contain the decisions of the lower Prize Courts at Hamburg and Kiel, of which there was a large number and from many of which appeals were not taken to the Supreme Court. A third volume completing the collection has been announced, but it has not yet appeared. Many of the decisions were published, as rendered, in the *Juristische Zeitung* and some appeared in the *Zeitschrift für Völkerrecht.* Two fascicles containing French translations of 99 of the more important decisions of the Supreme Prize Court and edited by Mms. Paul Fauchille and Charles DeVisscher with the collaboration of M. Blociszewski were published at Paris in 1922 and 1924, under the title *Jurisprudence Allemande en Matière de Prises Maritimes.* Like the Italian collection it is supplemented by various *annexes* containing the texts of important German ordinances and other documents relating to the organization and jurisdiction of the German Prize Courts. Throughout this work, whenever reference

is made to a German decision found in both collections both sources are usually cited.

No collection of the Austro-Hungarian Prize Court decisions appears to have been issued. The decisions, however, some 246 in number, were regularly published in the successive issues of the *Normal Verordnungsblatt für die K.U.K. Kriegsmarine* during the years 1915-1918. What purports to be a complete file of the issues containing these decisions was furnished me by the Austrian Minister of Justice.

The decisions of the Supreme Prize Court of China—fifteen in number—together with the Chinese Prize Court Rules and the regulations governing capture at sea have been translated into English by Mr. F. T. Cheng and published by the Court under the title "Judgments of the High Prize Court of the Republic of China" (Peking, 1919). A French translation of some of the decisions appeared in the *Revue Générale de Droit International Public* for 1920. None of the decisions of the lower prize court at Shanghai appear to have been published.

The decisions of the Japanese Prize Court at Sasebo and of the Supreme Prize Court—there were only four altogether—were published in the Japanese language by the Japanese government. For my use I had an English translation of these decisions made by a competent Japanese scholar. An English translation of three of them may be found in the Naval War College "International Law Decisions and Notes" for 1923 (pp. 161 ff).

Two decisions only appear to have been rendered by the Prize Court of Siam. They involved the status under the Sixth Hague Convention of eleven German merchant vessels seized in the port of Bangkok at the outbreak of the War between Germany and Siam. The decisions are summarized by M. Padoux in Clunet's *Journal du Droit International*, Volumes 45 and 46 (pp. 1316 and 428 respectively). Some eighty decisions are said to have been rendered by the Portuguese Prize Court and four by the Prize Court of Roumania, but I am informed that they have never been published and my efforts to obtain copies of them were without success. The same result attended my efforts to obtain the decisions of the Russian and Turkish Prize Courts.[1] With these relatively unimportant exceptions, I have succeeded in procuring the texts of practically all the reported decisions rendered

[1] I am informed that the functions of the Turkish Prize Court were in the main confined to the disposition of certain small craft belonging to enemy residents residing in the ports of the Bosphorus and Marmora. No decisions of importance were rendered by the Court.

by the Prize Courts during and following the close of the war. Apart from the collections and official journals referred to above, there are various miscellaneous sources in which the more important decisions may be found. Thus the decisions involving the claims of Dutch Nationals (the number was very large) were published in the language in which they were pronounced, in the *Grotius Annuaire International* during the years 1916-1924. The English decisions appeared in various legal periodicals such as the *Law Times;* the German decisions in the *Juristische Zeitung;* and the more important decisions of various countries were published in the leading journals of international law such as the *American Journal of International Law,* the French and Belgian *Revues de Droit International,* the *Zeitschrift für Völkerrecht,* the *British Year Book of International Law,* etc.

It is somewhat singular that in a number of maritime belligerent countries no Prize Courts were organized. This was the case in Bulgaria, the United States, Brazil and the other American states which became belligerents. It does not appear that any captures were made at sea by the naval forces of these countries, although in most of them enemy vessels—in some cases large numbers—were seized in their ports upon the declaration of war. But instead of being placed in the custody of the Prize Court and condemned or ordered to be detained until the end of the war in accordance with the terms of the Sixth Hague Convention, as was the practice in other countries, they were dealt with by the legislative or executive organs of the government. Prize decisions are therefore lacking in those countries where this procedure was followed, although in the United States there were some admiralty decisions, the best known of which was that in the case of the *Appam.*[1] This procedure of appropriating enemy merchant vessels seized in port at the outbreak of war without prize adjudication has been criticized as irregular if not contrary to the established practice but there would seem to be no solid foundation for the claim that prize adjudication is essential in such cases.[2]

In comparing the decisions of the prize tribunals of the differ-

[1] See Secs. 68, 69, and 173, *infra.*

[2] Compare, for example, the view of the United States District Court for the Southern District of New York, in the case of the *Gaelic Prince* (decided Jan. 23, 1923) to the effect that the seizure of German vessels in the ports of the United States by the executive in pursuance of the joint resolution of Congress of May 12, 1917, vested title to such vessels in the government of the United States. Congress may, the Court added, "provide a direct action for the seizure and condemnation of enemy vessels, in place of the customary prize proceedings."

ent countries one is struck, first of all, by the difference of attitude which the Prize Courts of Great Britain, on the one hand, and those of Continental Europe, on the other, adopted in respect to the function of the judge, the methods and processes of interpretation and the form and nature of the judgment. The decision of a Continental judge is usually very brief, rarely covering more than four or five pages of print and often less. It usually contains only a brief statement of facts, a series of *considérants* or "whereases" and the conclusions of the Court. There is little in the nature of argument or exposition, little reliance upon precedents and usually no citation of previous decisions of its own country or those of foreign countries.[1] The English decisions, on the contrary, are frequently long-drawn-out, sometimes to lengths which seem inordinate.[2] They contain a detailed statement of the facts involved, a summary of the contentions of opposing counsel, a profuse citation of previously reported decisions, and sometimes even of unreported cases extracted from the public archives, quotations from the opinions of authoritative text writers, sometimes an exhaustive historical review of the law and practice, and always an elaborate argument of the Court in support of its conclusion.[3] Sometimes they are monuments of painstaking research and industry and in important cases the opinion of the Court constitutes a learned and illuminating contribution to the history and development of the particular question of law involved.

Well-reasoned, based upon the precedents and supported by the authority of learned text writers, the opinions of the English Prize Courts are not only more instructive but they are regarded as more authoritative, at least in Anglo-Saxon countries, than the brief, largely unreasoned and unsupported judgments of the Continental prize tribunals. In making this general observation it is only just to remark, however, that some of the decisions of the Belgian Prize Council during the late war, like those of Great Britain, contained elaborate expositions of the law, were well-reasoned and were supported by the authority of an array of decided cases. In a less degree this was true of some of the German decisions.

Among the notable judges who exercised prize jurisdiction during the late war Sir Samuel Evans will easily be accorded the

[1] As to this see Sec. 119 *infra*.
[2] For example the decision in the *Kim* case fills 213 pages in Lloyd's Reports; that in the *Leonora* case 103 pages.
[3] As to this see Secs. 116-118 *infra*.

first place. As President of the Probate, Divorce and Admiralty Division of the English High Court during the first four years of the war (he died on September 13, 1918, as the result of accident), he was called upon to decide hundreds of cases and it may be said without fear of contradiction that he proved to be a worthy successor of Lord Stowell and that many of his decisions will rank with those of his great predecessor. His rôle, however, was essentially different from that of Lord Stowell as was the task which confronted him. When Stowell became judge of the Prize Court England had no clear and definite body of prize law and there were few judicial precedents to guide him. It devolved upon him, therefore, to lay down the principles of prize law and to apply them to the facts of the particular cases which came before him for decision. As has been well said he was rather a lawgiver than a judge.[1] The task of Sir Samuel Evans, on the other hand, was for the most part, the more modest one of applying the rules elaborated by his distinguished predecessor to the facts in similar or identical cases, and imbued as he was with the Anglo-American doctrine of *stare decisis* he felt bound to follow the judgments of Lord Stowell, and this he did rigorously without, save in rare and exceptional cases, departing from them. Nevertheless, owing to the vast changes that had taken place since Lord Stowell's day, in the methods of naval warfare, in the manner of carrying on commerce, in the methods of financing international trading and shipping operations and in the modes of communication and transportation, Sir Samuel was called upon to develop, adapt and apply the rules of law built up by the genius of Stowell to new and changed conditions and circumstances. This was his chief task and its performance constituted his principal contribution to English prize law. But he held strictly to the doctrine of *stare decisis,* and refused to admit in particular cases that mere changes in the methods and practice of international finance and commerce, however widely they were followed, operated in themselves to effect changes in the settled principles of the law, and he even went to the length of asserting that it was for merchants and shippers themselves to alter and adapt their methods so as to conform to the rules of law as they were enunciated by Lord Stowell, rather than that the Prize Court should alter or extend the law so as to bring it into harmony with modern mercantile and maritime practice.

[1] Roscoe, *Lord Stowell, His Life and the Development of English Prize Law,* p. 51.

He admitted that "international law to be adequate as well as just must have regard to the circumstances of the times" and that "precedents handed down from earlier days should be treated as guides to lead and not as shackles to bind," but he asserted emphatically that the guides "must not be lightly deserted or cast aside" and that a court of law "must proceed upon defined principles." [1] While, therefore, he would not ignore the changed conditions under which the old rules had to be applied he refused to depart from an established rule merely because it would result in injustice, always insisting that it was for the Crown in the exercise of its bounty to redress the wrong and not for the Court to alter the law. He was slow to recognize that the law had progressed since the days of Mansfield and Stowell; generally, he placed the burden of proof on claimants and if no decision could be found in support of their claims they were denied. While enemy claimants were given the benefit of the Hague Conventions when their governments had ratified them, the Conventions were construed strictly against them and he repudiated the notion that there was any such thing as a "spirit" of the Conventions apart from their plain language. Some of his decisions, for this reason, have been criticized as harsh and unduly technical, and as having sacrificed justice to the maintenance of a traditional legal doctrine. But on the whole they were in accord with the accepted Anglo-American rule of interpretation. It is claimed as the chief merit of this rule that while it may result in injustice in some cases it insures certainty and continuity in the development of the law. In consequence, it is said, England today has a clear and comprehensive body of prize law such as no other country can boast of.[2] Sir Samuel had a keen eye for detecting fraud and subterfuge as well as an extraordinary capacity for unraveling tangled skeins and discovering facts concealed in a complicated maze of technicalities. He was, it may be added, merciless in dealing with a claimant who he was convinced was guilty of endeavoring to deceive the Court by concealing facts or misrepresenting the nature of his transactions. Some of his decisions are monuments of research, industry and learning, and as such they constitute permanent and valuable contributions to prize jurisprudence. Many of the cases which came before him were exceedingly

[1] See his observations in the case of *Kim* (III Lloyd at p. 355, and I Br. & Col. Pr. Cas. at p. 478) and in the *Odessa* and the *Cape Corso* (I *ibid.* p. 326 and I *ibid.* p. 174). See also Secs. 117 and 121 *infra.*

[2] Compare an editorial in the *Law Times*, Vol. 151, p. 107.

complicated and the real facts were difficult of ascertainment. Here his indefatigable industry and his keen insight were displayed in a manner which challenged the admiration of the bar. When it was a question of law alone which was involved he examined tirelessly and with painstaking care the reported decisions and when none could be found he searched the public record office for unreported cases, sometimes with success. While appeals were not infrequently taken from his decisions they were, with rather rare exceptions, affirmed by the Judicial Committee which sometimes went out of the way to bestow praise upon his decisions for their learning, lucidity and soundness of logic.[1] His successors, Lord Sterndale and Sir Henry Duke, carried on his unfinished work and in the main they followed the lines he had laid down. Some of the members of the Judicial Committee which heard the cases appealed from the lower prize courts deserve to be mentioned among the great prize judges of the War. This is particularly true of Lords Parker and Sumner, some of whose opinions, characterized as they are by evidences of profound learning and research, constitute permanent and authoritative contributions to the literature of prize jurisprudence.

Some of the judges of the British overseas Prize Courts likewise pronounced decisions which will take high rank among the judicial contributions to the law of prize. It must suffice to mention here Mr. Justice Cator of the Prize Court for Egypt, before which a large number of important cases were heard. In some respects he was the antithesis of Sir Samuel Evans. He adopted a more liberal and advanced attitude in respect to the progress of international law; he had a high conception of its rôle and of the function of the Prize Court in giving effect to its prescriptions; his point of view was less technical; he emphasized more strongly considerations of equity and attached less importance to what he called the "dead hand of outworn precedent." He recognized the "spirit" as well as the letter of the Hague Conventions, declared that they should be construed liberally in favor of claimants and maintained that the latter should be given the benefit of any doubt which might arise in the mind of the judge. He declared that it was the right and duty of a Prize Court "to so alter its practice from time to time as to reflect the changing conditions of civilization that it has to serve"; and that it was "right and just that the milder views

[1] It appears that appeals were taken from Sir Samuel's decisions in 42 cases. In 30 of them his judgments were affirmed; in 8 they were reversed; and in 4 they were varied.

of the present generation should find an echo in the practice of our prize courts." A Prize Court, he said, is "peculiarly the guardian of its nation's honor, and foreign countries will cite its decisions as indicating the temper of the people." It should therefore "interpret the rules of international law in a broad spirit rather than a narrow one" and it should be the privilege as it is the duty of the Court "to see that the rules of international law and the practice of the Court are kept in harmony with the general sentiment of humanity, else it may subject itself to the reproach of administering a dry husk in lieu of a living law." [1]

Of the eminence and ability of the prize judges of other countries than those of Great Britain it is difficult to form an estimate. There may possibly have been some who deserve to be ranked with the greatest of the English judges, but this may be seriously doubted, for the reason that they were rarely lawyers with judicial experience, but were for the most part naval officers, foreign office representatives, administrative functionaries, etc. Moreover, their opinions generally are too brief and too lacking in reasoned arguments to afford the basis of a judgment as to the learning and ability of the judges who wrote them.

[1] See especially his opinions in the cases of the *Gutenfels*, the *Bärenfels*, the *Marquis Bacquehem* and the *Lützow No. 4*. Only three of the reported judgments of the Prize Court for Egypt appear to have been reversed by the Judicial Committee, although several were varied.

PRIZE LAW DURING THE WORLD WAR

PRIZE LAW DURING THE WORLD WAR

CHAPTER I

FUNCTION AND ORGANIZATION OF PRIZE COURTS

I

Necessity, Object, and Nature

Sec. 1. Necessity of Prize Adjudication. Lord Mersey speaking for the Judicial Committee of the English Privy Council in the case of the *Odessa*[1] thus defined the rôle of a Prize Court in modern maritime warfare:

"All civilized nations up to the present time have recognized the right of a belligerent to seize, with a view to condemnation by a competent Court of Prize, enemy ships found on the high seas or in the belligerents' territorial waters, and enemy cargoes. But such seizure does not, according to British prize law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted Court of Prize, and the captor must then ask for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing State, in this country by the Procurator-General. It is a suit *in rem*, and the function of the Court is to inquire into the national character of the thing seized. If it is found to be of enemy character, the duty of the Court is to condemn it; if not, then to restore it to those entitled to its possession."

Similarly, Lord Parker in the case of the *Zamora*[2] emphasized the obligation of belligerents to establish Prize Courts for the purpose of redressing wrongs sustained by neutrals in consequence of unlawful belligerent acts. He said:

[1] II Lloyd 405; I Br. & Col. Pr. Cas. at p. 559.
[2] IV, *ibid.*, 62; II, *ibid.*, at p. 13.

"It follows that, but for the existence of Courts of Prize, no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels, and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the Court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation." [1]

These statements by the highest judicial authority in England affirm a universally admitted principle of prize law, namely, that prize adjudication is an essential element in the exercise of the belligerent right of capture in maritime war, and that the physical act of capture, the *occupatio bellica*, does not by itself give the captor a valid title to the thing seized. Until the seizure has been adjudged lawful by a duly constituted prize tribunal the title of the captor is merely precarious or inchoate and not legally definitive; until then he has merely a right *en herbe*, as the French say, a right of detention which can be converted into an indefeasible right of legal ownership only by a judgment of the Prize Court condemning it and pronouncing its confiscation.[2]

[1] Compare also the observations of Lord Phillimore, President of the Naval Prize Tribunal, in the case of the *Leda* (VIII Lloyd at p. 469); and of Lord Sumner in the *Oscar II* (IX *ibid.*, at p. 287), who said: "The belligerent right of the Crown is to seize the property of neutrals at sea in time of war under circumstances and under certain conditions. One such condition is that the property be brought before a Court of Prize for adjudication."

[2] The United States Supreme Court in the case of the *Appam*, 1917 (243 U. S. 124—See Sec. 69 *infra*), in upholding the claim of jurisdiction by the District Court in this case, before the prize had been condemned by the German prize court, apparently proceeded on the theory that the mere fact of capture gave the German State no legal title to the ownership of the vessel. See also the remarks of Johnson, J., in the *Adventure* (8 Cranch 221, 226); of Story, J., in the *Star* (3 Wheaton 78, 86); and of the Supreme Court in the *Nassau* (4 Wall. 634, 641). But it may be observed that by the U. S. Naval Instructions of 1917 the capture of a "public vessel in the military service of the enemy" vests title immediately in the government of the captor. See further as to this sec. 60 *infra*. Compare Fauchille, *Droit Int. Pub.* t. II, p. 57; De Boeck, *De la Propriété Privée Ennemie*, p. 347; Oppenheim, *Int. Law*, II, p. 626; Verzijl, *Droit des Prises de la Grande Guerre*, p. 209; Hyde, *International Law*, II, pp. 818-819, and the authorities there cited; and Scott, 10 *Amer. Jour. of Int. Law*, pp. 826 ff., and the cases there cited. Neutral states, says Phillimore (*Int. Law*, III, p. 651), have a right to demand *ex debito justitiæ* that there be courts for the administration of international law, sitting in the belligerent countries. "By the law of nations and treaties," declared Lord Mansfield in 1781, "every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters or in port. Neutral convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law and a court for the trial of prize.

Sec. 2. The Same. Controversy Between the United States and Germany. Case of the "Frye." A controversy arose during the late war between the governments of the United States and of Germany regarding the necessity of prize proceedings and as to the competence of the German Prize Court to pass upon the legality of the destruction by a German cruiser on January 28, 1915, of the *William P. Frye*, an American sailing vessel.[1] Upon the demand of the American government for full reparation for the destruction of the vessel, the German government replied that the Prize Court must first "examine into the legality of the capture and destruction and also pronounce upon the standing of the claimants and the amount of the indemnity." The validity of the act of the German commander was, it asserted, subject to determination by the German Prize Court, under the terms of Article 51 of the Declaration of London, which provides that a captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the capture, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49 and that if he fails to do this, he must compensate the parties interested and no examination shall be made of the question whether the capture was valid or not. The German government further contended that prize proceedings were necessary, under section 1 No. 2 of the German code of prize procedure.[2] To this contention the American Secretary of State replied that inasmuch as the German government had admitted its liability for damages resulting from the destruction of the vessel, the government of the United States felt that "it would be inappropriate in the circumstances of this case and would involve unnecessary delay" to

Every country sues in these Courts of the others." (*Lindo v. Rodney*, 2 Doug. at p. 615.) Article 112 of the Manual of the Laws of Maritime War adopted by the Institute of International Law at its Oxford Session in 1913 declares that "A belligerent State acquires the ownership (*propriété*) of a ship or goods that it has seized during war only at the moment when a definitive decision of the Prize Court shall have pronounced in its favor the confiscation of the ship or goods." If, Fauchille adds (*op. cit.* t II p. 574), the ship or cargo are recognized enemy property and they have been seized according to custom, they constitute a *maritime prize;* the attribution of the same to the captor (by the judgment of a Prize Court) constitutes a *right.* The Chinese Prize Court Rules (1917) declare that "all matters relating to capture at sea shall be adjudicated in the Prize Courts." (Art. 1.) The French Instructions of 1912 (revised in 1916) declare that capture is the purely military act by which the commander of a ship of war substitutes his authority in the place of that of the captain of a merchant vessel . . . "under reserve of the ulterior judgment of the Prize Council concerning the definitive lot of the ship and cargo." (*Observations générales* 1.)

[1] See further as to this case, Sec. 53 *infra.*

[2] Reply of the German Foreign Office to Ambassador Gerard's note of April 3, 1915, Spec. Supp. to 9 *Amer. Jour. of Int. Law* (1915), p. 181.

adopt the German suggestion that the question should be submitted to a Prize Court. He added:

"Unquestionably the destruction of this vessel was a violation of the obligations imposed upon the Imperial German government under existing treaty stipulations between the United States and Prussia, and the United States government, by virtue of its treaty rights, has presented to the Imperial German government a claim for indemnity on account of the resulting damages suffered by American citizens. The liability of the Imperial German government and the standing of the claimants as American citizens and the amount of indemnity are all questions which lend themselves to diplomatic negotiation between the two governments, and happily the question of liability has already been settled in that way. The status of the claimants and the amount of the indemnity are the only questions remaining to be settled, and it is appropriate that they should be dealt with in the same way."[1]

To this note the German Secretary of State replied, saying that the German government could not admit the accuracy of the American assertion that the destruction of the *Frye* was a violation of treaties between the United States and Germany; on the contrary, those treaties recognized the right of the parties to intercept contraband going to an enemy and, in extreme cases, to destroy the contraband and the ship carrying it. He added:

"According to general principles of international law, any exercise of the right of control over the trade in contraband is subject to the decision of the Prize Courts, even though such right may be restricted by special treaties. At the beginning of the present war Germany, pursuant to these principles, established by law prize jurisdiction for cases of the kind under consideration. The case of the *William P. Frye* is likewise subject to the German prize jurisdiction, for the Prussian-American treaties mentioned contain no stipulation as to how the amount of the compensation provided by Article 13 of the treaty cited is to be fixed. The German government therefore, complies with its treaty obligations to a full extent when the Prize Courts instituted by it in accordance with international law proceed in pursuance of the treaty stipulations and thus award the American interested persons equitable indemnity. There would, therefore, be no foundation for a claim of the American government, unless the Prize Courts should not grant indemnity in accordance with the treaty; in such an event, however, the German government would not hesitate to arrange for equitable indemnity notwithstanding. For the rest, prize proceedings in the case of the *Frye* are indispensable, apart from the American claims, for the reason that other claims of neutral and enemy interested parties are to be considered in the matter."[2]

Again the American Secretary of State returned a reply in which he reaffirmed his earlier view that the claim was one which

[1] *Ibid.*, 183. [2] *Ibid.*, 184.

must be settled through the diplomatic channels and not by the decision of a Prize Court, which would in no way be conclusive or binding upon the government of the United States.[1] He added:

"The real question between the two governments is what reparation must be made for a breach of treaty obligations, and that is not a question which falls within the jurisdiction of a Prize Court. In my first note on the subject the government of the United States requested that 'full reparation be made by the Imperial German government for the destruction of the *William P. Frye*.' Reparation necessarily includes an indemnity for the actual pecuniary loss sustained, and the government of the United States takes this opportunity to assure the Imperial German government that such an indemnity, if promptly paid, will be accepted as satisfactory reparation, but it does not rest with a Prize Court to determine what reparation should be made or what reparation would be satisfactory to the government of the United States.

"Your Excellency states in your note of June 7 that in the event the Prize Court should not grant indemnity in accordance with the treaty requirements, the German government would not hesitate to arrange for equitable indemnity, but it is also necessary that the government of the United States should be satisfied with the amount of the indemnity, and it would seem to be more appropriate and convenient that an arrangement for equitable indemnity should be agreed upon now rather than later. The decision of the Prize Court, even on the question of the amount of indemnity to be paid, would not be binding or conclusive on the government of the United States.

"The government of the United States also dissents from the view expressed in your note that 'there would be no foundation for a claim of the American government unless the Prize Courts should not grant indemnity in accordance with the treaty.' The claim presented by the American government is for an indemnity for a violation of a treaty, in distinction from an indemnity in accordance with the treaty, and therefore is a matter for adjustment by direct diplomatic discussion between the two governments and is in no way dependent upon the action of a German Prize Court. For the reasons above stated the government of the United States can not recognize the propriety of submitting the claim presented by it on behalf of the owners and captain of the *Frye* to the German Prize Court for settlement."[2]

Again the German Secretary of State reaffirmed his original position that the question whether the naval commander acted legally in destroying the *Frye* was "primarily a subject for the consideration of the German Prize Courts, according to general principles of international law, according to the Hague Convention for the establishment of an international Prize Court and

[1] Compare also the controversy between the American and British governments regarding the right of diplomatic intervention in the place of prize adjudication, Sec. 25 *infra*.

[2] *Ibid.*, 185.

according to Article 51 of the Declaration of London.[1] He added that in pursuance of this view the case had been submitted to the Prize Court at Hamburg and that it had rendered a judgment on July 10, 1915, upholding the legality of the destruction, but that it had at the same time upheld the validity of the treaties which made Germany liable for an indemnity. The Court being unable to fix the amount of the indemnity, for want of data, the German government proposed that the determination of the amount be entrusted to two experts, one selected by each party.[2] The German government, he said, would promptly pay the amount as "a duty or policy founded on existing treaty obligations" but not as a satisfaction for the violation of American treaty rights. If this proposal should not be acceptable to the American government Germany was willing to submit the difference to the Hague Court of Arbitration. The American government agreed to accept the first suggestion on the assumption that the arrangement should include provision for an umpire in case the experts failed to agree and provided that the acceptance of the indemnity should be understood to be without prejudice to the American contention that the sinking of the *Frye* was without legal justification. The Secretary of State added that it would be necessary to determine in case the proposal were accepted whether, pending the arbitral award, the German government would govern its naval operations in accordance with its own interpretation or that of the United States.[3] In a note of Sept. 20, 1915, the German Secretary of State informed the American government that it had given orders to its naval forces not to destroy American merchant vessels transporting *conditional* contraband "even when the conditions of international law were present."[4] Here the correspondence ended and it may be added that the agreement to arbitrate was never carried out.

Sec. 3. Function of a Prize Court. In general, the office of a Prize Court is to determine the validity of maritime captures, that is, whether a particular capture was legal according to the principles of international law. The determination of various ancillary or incidental questions which arise in connection with the decision of the principal question also falls within

[1] *Ibid.*, 188.
[2] The judgment is not printed in the collection of Prize Court decisions used in the preparation of this work and the German government declined to furnish the American government with a copy. Scott, *A Survey of International Relations Between the United States and Germany*, p. 333.
[3] *Ibid.*, 192.
[4] Supp. to 10, *ibid.*, p. 345.

the jurisdiction of the Prize Court, the extent of such jurisdiction varying in the different countries.[1] Lord Parker said in the case of the *Roumanian*[2] "the chief function of a court of prize is to determine the question 'prize or no prize'; in other words, whether the goods seized as prize were lawfully so seized, so as to raise a title in the Crown." But where the Prize Court has once acquired jurisdiction over the principal cause it will exercise its authority over all the incidents: claims for freight, damages, expenses, costs, maritime torts, etc.[3]

Prize Courts, it may be observed, are set up both in the interest of the belligerent and for the protection of the rights of neutrals. Lord Sumner in the case of the *Leonora*[4] thus defined this dual rôle:

"The office of a Court of Prize is to provide a formal and regular sanction for the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally the duty of a Court of Prize, by virtue of its general jurisdiction as such, to provide for the regular enforcement of that right, when lawfully asserted before it, and not to leave that enforcement to the mere jurisdiction of the sword. Disregard of a valid measure of retaliation is, as against neutrals, just as justiciable in a Court of Prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a Court of Prize is at least as essential in the neutral's interest as in the interest of the belligerent, and if the Court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other."

Originally Prize Courts were regarded as national organs established for the purpose of enabling a belligerent state to ascertain and fix its own responsibility for the acts of its commissioned warships,[5] but they have become more and more to

[1] As to this see Secs. 55 ff. *infra*. As the Belgian Prize Council remarked in the case of the *Zaanstroom* the rôle of a Prize Court is entirely different from that of the government, in that the latter may release a prize even where its capture was legal according to international law, whereas the Prize Court cannot do so.

[2] II Lloyd 378; I Br. & Col. Pr. Cas. at p. 546.

[3] Sir Samuel Evans in the case of the *Corsican Prince* (I Br. & Col. Pr. Cas. 183), quoting Story's *Notes on the Principles and Practice of Prize Courts* (pp. 30-32). In the case of the *Stigstad* Sir Samuel Evans offered to decide as an *arbitrator* what sum, if any, should be paid the shipowners in consequence of the detention of their vessel, but he added that since such decision would be merely an arbitral award, there could be no appeal from it.

[4] VII Lloyd 356; III Br. & Col. Pr. Cas. at p. 396.

[5] Compare Pyke, 32 *Law Quar. Review*, p. 148, and 16 *Jour. of Soc. of Comp. Leg.* (new Ser. 1916), p. 106; Wheaton, *Int. Law* (5th ed., 1918),

be regarded as organs for the protection of the rights of neutrals and it was this motive which led to the attempt in 1907 to establish an international Prize Court. The conception that the purpose of Prize Courts is not so much, however, the protection of neutrals as to insure the observance by the naval forces of national prize regulations and instructions still dominates Continental European juristic thought—and especially that of Germany.[1] This view was emphasized by the German Supreme Prize Court in the case of the *Batavier V*[2] where after declaring that Prize Courts are national tribunals it asserted that "they are established by their state to determine whether the legal instructions to which the naval authorities should conform are observed or not." In Anglo-American countries, however, the rôle of the Prize Court as "a trustee for persons who are found ultimately to be entitled to captured property" receives greater emphasis. It ought to be equally the function of a Prize Court to safeguard the lawful rights and interests of neutrals against belligerent excesses as well as to enforce the observance by overzealous naval commanders of the instructions which they receive from their Sovereign, for as Judge Cator justly observed in the case of the *Marquis Bacquehem*[3] "A Prize Court is peculiarly the guardian of its nation's honor, and foreign countries will cite its decisions as indicating the temper of its people." "It is not the function of a Prize Court," said Lord Sumner in a famous case, in answer to the argument that Germany by her general misconduct had forfeited her right to the benefit of a particular Hague Convention, "to be a censor of the general conduct of a belligerent, apart from his dealings in the particular matters, which come before the Court, or to sanction disregard of solemn obligations by one belligerent, because it reprehends the whole behavior of the other."[4] The spirit which

p. 608, and Holland, *Letters on War and Neutrality* (2d ed., 1914), p. 171. Dupuis (*Le Droit de la Guerre Maritime*, p. 400) remarks that according to English doctrine it is the neutral interest alone that renders prize adjudication necessary. Compare also the remarks of Lord Parker in the case of the *Zamora* (II Br. & Col. Pr. Cas. at p. 12).

[1] Compare Bonfils, *Manuel de Droit Int. Pub.*, 6th ed., p. 851, and the authorities there cited, and Dana, *Notes to Wheaton*, p. 480.

[2] Fauchille et De Visscher, *Jurispr. All.* 90. To the same effect see the *Zaanstroom I Entscheidungen des Oberprisengerichts in Berlin*, 118 (hereafter cited as *Entsch.*) and Fauchille et De Visscher, *Jurisprudence Allemande en Matière de Prises Maritimes*, 97 (hereafter cited *Jurispr. All.*).

[3] I Br. & Col. Pr. Cas. at p. 134.

[4] The *Blonde*, *Hercules* and *Prosper*, X Lloyd 246; III Br. & Col. Pr. Cas. at p. 1045. Compare in this connection the remarks of Lord Sumner in the *Deutsche Kohlen Depôt* case (VIII Lloyd at p. 152) to the effect that "a Prize Court is not warranted in creating a penalty where the [Suez

should guide every Prize Court was expressed by Sir Henry Duke when, adverting to the general rule under which the carriage of contraband forfeits the right to freight, he said: "but there is a higher rule than that, and it is, that the Court shall do justice." [1]

Sec. 4. Nature of Prize Courts. Are Prize Courts national or international tribunals? As is well known, Sir William Scott in his day affirmed that the British Prize Court, although sitting under the authority of the King of Great Britain, was "a court of the law of nations"; that it was charged with administering the law of nations and that although the seat of its authority was local it was the duty of a British Court to decide questions submitted to it as it would decide them if it were sitting at Stockholm.[2] Sir William Scott of course did not mean to imply that a Prize Court is a court of the law of nations in the sense that it is established and organized by international agreement; on the contrary, he expressly affirmed that the British Prize Court sat under the authority of the King of Great Britain; that is, it was a national rather than an international court from the point of view of its organization and source of authority. It was an international tribunal only in the sense that it was charged with applying international law and of administering justice between nations; in short, it was international in its misson, but national in organization.[3] This was the view taken by the British Prize Courts during the late war. Thus Judge Grain of the Prize Court for Egypt admitted in the case of the *Bärenfels* [4] that the

Canal] Convention creates none, or in declaring a seizure to be bad because in no other form could it effectively create a penalty at all."

[1] The *Prins der Nederlanden*, VI Lloyd 181; III Br. & Col. Pr. Cas. at p. 701.

[2] The *Maria*, 1 C Rob. 350. Compare also his opinions in the *Recovery*, 6 *ibid.* 348; the *Walsingham Packet*, 2 *ibid.* 77, and the *Fox*, Edwards Adm. Rep. 312. Dr. Lushington in the case of the *Franciska* (Spinks 111; 2 Eng. P. C. 346) referred to the Prize Court as being "not a municipal court but a court for the administration of public law." The following authorities apparently consider Prize Courts to be international tribunals, at least in some sense: Halleck, *Int. Law*, II, p. 111; Maine, *Int. Law*, p. 96; Hall, *Int. Law*, p. 277, and Phillimore, *Int. Law*, 3d ed., III, pt. 11, ch. 1. Pitt Cobbett (cases II, 192) states that they are national courts only in the sense that they are established and regulated by the sovereign authority of the country in which they sit, and from which they must ultimately take the law which they apply even though that law may not conform to the law of nations. Baty and Morgan (*War, Its Conduct and Legal Results*, p. 362) say "a Prize Court resembles, as Dr. T. A. Walker remarks (*Science of Int. Law*, p. 46), a divisional court sitting in a particular country, of a great international tribunal."

[3] Compare in this sense De Boeck, *op. cit.*, p. 349; Fauchille, *op. cit.*, p. 579; Dupuis, *Le Droit de la Guerre Maritime*, Sec. 221; Oppenheim, *op. cit.*, 3d ed., Vol. II, p. 626; Holland, *Letters on War and Neutrality*, 2nd ed., p. 171; Westlake, *Int. Law*, 2nd ed., pt. II, pp. 155, 317; and Pyke, 32 *Law Qu. Review*, p. 148.

[4] I Br. & Col. Pr. Cas. at p. 129.

Prize Court was an international tribunal in the sense that by the Order in Council and the commission appointing him to sit in prize charged him "to hear and determine according to the law of nations" and he asserted that he was not sitting "solely for the purpose of administering the municipal law of this land." But there was nothing in his opinion to indicate that he considered the Prize Court to be an international organ in the sense that its jurisdiction was derived from any other source than that of the sovereign authority by which it was constituted. "It must be remembered," said Lord Parker in the case of the *Roumanian*[1] "that the jurisdiction of the Prize Court is based in every case upon a Commission under the Great Seal." In the case of the *Zamora*[2] his Lordship said: "Of course the Prize Court is a municipal court, and its decrees and orders owe their validity to municipal law . . . a Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign state which calls it into being." Both the German and French Prize Courts emphasized that they were national tribunals and as such were bound to apply national law even when it was not in conformity with international law.[3]

II

Organization

Sec. 5. Practice as to Number During World War. Prize Courts being municipal rather than international organs their constitution and organization are matters which are determined entirely by the legislative or executive authorities of the states in which they exercise their functions. In consequence, one finds marked differences in the constitution of those which were set up in the different countries during the late war, although there were certain features common to all of them. Thus in all the countries the prize jurisdiction was organized in two instances: a tribunal of first instance and a tribunal of appeal. The number of tribunals of first instance varied. In Austria-Hungary, China, France, Belgium, Italy, Japan, Portugal,[4] Roumania and Siam only one

[1] II Lloyd, 378; I Br. & Col. Pr. Cas. at p. 546.
[2] IV *ibid.*, 62; II *ibid.*, at p. 12.
[3] See Sec. 133 *infra.*
[4] By the decree-law of April 20, 1916, jurisdiction to conduct preparatory examinations in prize cases, however, was conferred on all the commercial tribunals of Portugal, but the right to pronounce definitive judgments was reserved to that of Lisbon.

such tribunal was established. In their respective countries they sat at Pola, Shanghai, Paris, Antwerp, Rome, Sasebo, Lisbon, Galatzi and Bangkok. The Courts of Appeal sat in the same places except in Austria-Hungary where its seat was Vienna, in Belgium where its seat was Brussels, in China where it sat at Peking, in Japan where it sat at Tokio, and in Roumania where it sat at Bucharest.

In Germany two Prize Courts of first instance were constituted: one at Hamburg, the other at Kiel, the seat of the Supreme Prize Court being at Berlin. In Russia prize tribunals of first instance were established at Cronstadt, Sebastopol, at Vladivostok and one at Alexandria in Egypt (territory occupied by Russia's ally), the court of appeal being at St. Petersburg.

In Great Britain the principal Prize Court sat at London and by it the great majority of cases were decided. But certain designated courts in the dominions, in the colonies and in India—about 44 altogether—were duly constituted as Prize Courts and a goodly number of them were called upon to pronounce judgments, sometimes in important cases. This was particularly true of the supreme court of New South Wales (Sydney) which decided the cases of the *Remonstrant*, the *Germania No. 2* and the *Turul;* the supreme court of Ceylon which decided the cases of the *Australia* and the *Dandolo* and *Caboto;* the commercial court of Malta, which rendered the judgments in the case of the *Erymanthos,* the *Anastassios Koroneos, Turkish Moneys Taken at Mudros* and the *Venizelos;* and the Cape of Good Hope and Natal provincial divisions of the supreme court of South Africa which decided a good many cases.[1] The British government also set up a Prize Court at Alexandria, Egypt, a country which the Prize Court itself declared not to be neutral territory in view of the suzerainty of Turkey over it.[2] This Court decided a large number of important cases.[3] The Court itself stated in June, 1918, that it had heard and adjudicated about 1200 cases during the

[1] Other British courts which decided important cases were the supreme court of Bermuda (the *Leda*), the exchequer court of Canada (the *Bellas,* the *Oregon,* Nos. 1, 2 and 3, and the *Leonor*) ; the supreme court of Gibraltar (the *Daksa* and the *Cretic*) ; the supreme court of Hong Kong (the *Hanametal* and the *Palkat*) ; the supreme court of Jamaica (*Atlas and Lighters*) ; the royal court of St. Lucia (the *Lorenzo* and the *Thor*) ; and the high court of judicature of Bombay (the *Kara Deniz*).

[2] The *Gutenfels,* 1 Br. & Col. Pr. Cas. 102.

[3] Among them, the *Gutenfels,* Nos. 1 and 2; the *Bärenfels,* Nos. 1 and 2; the *Marquis Bacquehem,* Nos. 1 and 2; the *Achaia,* Nos. 1 and 2; the *Pindos,* the *Emil,* the *Maria,* the *Derflinger,* Nos. 1, 2, 3 and 4; the *Concadoro,* the *Rostock,* the *Lützow,* Nos. 1, 2, 3, 4, 5, and 6; the *Proton,* the *Constantinos,* the *Annaberg, Ten Bales of Silk at Port Said, Floating Craft of the Deutsches Kohlen Depôt,* the *Südmark* and others.

nearly fours years of its existence, that citizens or subjects of practically every nation in the world had appeared and pleaded before it and submitted to its judgments and that the validity of its establishment had never been questioned by the Egyptian authorities.[1]

France unlike Great Britain did not establish Prize Courts in any of her colonial possessions, all cases being heard by the Prize Council at Paris.

Sec. 6. Prize Courts of First Instance. Great Britain. In England original jurisdiction in matters of maritime prize was by the Supreme Court of Judicature Act of 1891 conferred upon the probate, divorce and admiralty division of the High Court of Justice to which the prize jurisdiction formerly exercised by the old High Court of Admiralty was definitely transferred. The latter court was by this act merged in the probate, divorce and admiralty division. The Prize Court, hitherto regarded as a separate entity, now became an integral section of the High Court of Justice and consequently, in the fullest degree, a legal tribunal.[2] Although the prize jurisdiction is conferred on a "division" of the High Court of Justice, it is in fact exercised by a single judge.[3] In this respect the constitution of the English Prize Court at London was unlike that of the Prize Courts of all other countries in which prize tribunals were established during the late war, the tribunals of those countries being composed of more than one judge. In another respect English practice differed from that of all the other countries, except Germany. In those countries a single Prize Court of first instance handled all cases involving questions of prize. In Great Britain, in addition to the Prize Court at London, certain courts in the dominions, in India, in the colonies, in the

[1] The *Lützow* No. 6, III Br. & Col. Pr. Cas. at p. 338.

[2] Roscoe, *History of the English Prize Court*, p. 67. This work published in 1924 contains an excellent summary of the development of the English prize jurisdiction from the earliest times to the present. See also Marsden, "Early Prize Jurisdiction and Prize Law in England," 24 *Eng. Hist. Review*, pp. 675-697; 25 *ibid.*, pp. 243-263, and 26 *ibid.*, pp. 34-56; Marsden, "Prize Law," *Jour. of Soc. of Comp. Leg.*, vol. 15 (1915), pp. 90-94; Holdsworth, *History of English Law*, Vol. I, pp. 330-332); 140 *Law Times* (1915-1916) pp. 417 ff. and 437 ff.; and Pyke, "The Law of the Prize Court," 32 *Law Quar. Review* (1916), pp. 144-149. See also Colombos, "The Prize Court at Malta," 16 *Jour. of Soc. of Comp. Leg.* (1916), p. 67, an article on the Calcutta Prize Court, 15 *ibid.* (1915), pp. 27 ff., and as to the Prize Court of Canada see the statement of the Deputy Minister of Justice in the case of the *Bellas* (I Br. & Col. Pr. Cas. p. 97).

[3] During the World War and after, the judges were in turn Sir Samuel Evans (from the outbreak of the war until his death, Sept. 13, 1918), Lord Sterndale (October 1918-1919) and Sir Henry Duke, now Lord Merrivale (1919 to the present).

protectorates and even in Egypt, as has already been stated, were constituted as Prize Courts and authorized to hear and determine questions of prize.[1] About twenty of the forty-four overseas courts so designated to exercise prize jurisdiction actually heard cases and rendered decisions. But unlike the Prize Court at London, some of those outside England were composed of more than a single judge.[2]

The French Prize Council as first constituted upon the outbreak of the late war was composed of a councilor of state who acted as president, two *maîtres des requêtes* of the council of state, two representatives of the ministry of foreign affairs and two representatives of the ministry of marine.[3] In September, 1916, it was composed of two councilors of state, one *maître des requêtes,* two representatives of the ministry of foreign affairs, one representative of the ministry of marine and one rear admiral of the navy—seven in all—to whom was attached a government commissioner taken from the council of state. Its membership therefore included only administrative functionaries and naval officers, no professional judges occupying seats on the council.

[1] The list is given in the London *Gazette* of Jan. 11, 1917, p. 448. By the Naval Prize Act 1864 every court of admiralty or vice-admiralty "authorized" to take cognizance of and judicially proceed in maritime matters of prize, was to be a Prize Court within the meaning of that Act. By the Colonial Courts of Admiralty Act, 1890, every colonial admiralty court was to have the jurisdiction conferred on a vice-admiralty court, although it could not exercise prize jurisdiction unless "duly authorized." A warrant is therefore necessary before any vice-admiralty or colonial court can exercise jurisdiction in matters of prize. As stated above, warrants were issued soon after the outbreak of the War in 1914 to a large number of such courts authorizing then to hear and determine cases in prize.

It has been customary since the beginning of the eighteenth century for the Crown to issue at the outbreak of war a commission to the Lords of the Admiralty authorizing and enjoining them to require the Prize Court to take cognizance of and judicially proceed upon all matters of captures, seizures, etc., and to hear and determine the same "according to the course of admiralty and the law of nations" (See text of the commission and warrant issued at the outbreak of the late War, in Roscoe, *History of the English Prize Court,* p. 46; also *Manual of Emergency Legislation,* 1914, pp. 248 ff.). In the case of the *Zamora* (II Br. & Col. Pr. Cas. at p. 9) the Judicial Committee of the Privy Council expressed the opinion that the commission is no longer necessary to enable the Prize Court to exercise the jurisdiction belonging to it.

[2] For example, the Prize Court of Egypt consisted of two judges, Cator and Grain. The decisions of the South African courts sitting in prize were rendered by one, two or three judges.

[3] Worms, *La Juridiction des Prises, Revue des deux Mondes,* Nov., 1915, Vol. 466, p. 400. The organization of the French prize jurisdiction has varied from time to time since the Revolution. As to this, see Vigière, *La Juridiction des Prises Maritimes* (1901), p. 87 ff.; Berthon, *La Juridiction des Prises Maritimes et la Cour Internationale des Prises* (1910), especially Ch. II; Barboux, *Jurisprudence du Conseil des Prises* (1872), especially Ch. IV; De Boeck, *De la Propriété Privée Ennemie* (1882), pp. 358 ff.;

Sec. 7. The Same. Germany and Austria-Hungary. The German Prize Courts at Hamburg and Kiel were each composed of five members including the president. The president and one member were required to be lawyers or persons learned in the law. Of the other three members one was required to be a naval officer, one a representative of the shipping industry and one a representative of the commercial interests. The government was represented by an imperial commissioner.[1]

The Austro-Hungarian Prize Court at Pola was composed of a rear admiral, or captain of a line battle ship, who acted as president, and two officers in the naval judicial service (*marine-justizdienst*). There was also a committee on preparatory investigation (*Prisenuntersuchungskommission*) made up of members representing the marine administration, who were experts in matters of international commerce.[2]

Sec. 8. The Same. Belgium, Italy, and Other Countries. It is somewhat singular that the prize jurisdiction in Belgium was not definitely organized until after the close of the war, although a special tribunal had been instituted at Antwerp on August 17, 1914, by the military governor of Antwerp to deal with the German ships seized in that port.[3] Proceedings were begun in one case (the *Gneisenau*) but they were soon interrupted by the German occupation of Antwerp and the recapture of the vessels. By a *loi organique du Conseil des Prises* of August 26, 1919, modified by the law of August 17, 1920, a Prize Council was established at Antwerp and the Court of Appeal of Brussels was made the tribunal of appeal in cases of prize. As constituted the Prize Council was composed of six members: a president and a vice-president, both chosen from among the councilors of the Court of Appeal, two "effective" members and two *suppléants*. During the years 1919-20 it heard and decided a number of cases most of which involved German vessels which

Pistoye et Du Verdy, *Traité des Prises Maritimes* (1859), t. II, pp. 145 ff.; and Colombos, "Some Notes on the Decisions of the French Prize Courts," 16 *Jour. of Soc. of Comp. Leg.* (new Ser. 1916), pp. 300 ff.

[1] *Prisengerichtsordnung*, Sec. 5; see also Huberich, "German Prize Law," 59 *Solicitors' Journal and Weekly Reporter* (1914-1915), p. 71, and Huberich and King, "Development of German Prize Law," 18 *Columbia Law Review* 503.

[2] *Prisengerichtsordnung*, Sec. 2; see also Huberich, "Austro-Hungarian Prize Courts," 59 *Solicitors' Jour. and Weekly Reporter*, p. 438. The Austro-Hungarian decisions all mention that the court sat under the presidency of a rear admiral and in the presence of two assessors: a superior auditor and a major auditor.

[3] De Visscher, 47 *Rev. de Droit Int. Pub. et de Lég. Comp.*, p. 229.

had been taken down the river Scheldt where they were interned by the Dutch authorities.[1]

The Italian Prize Commission was presided over by a first president of a Court of Appeal (active or retired) or by a president (active) of a section of a Court of Cassation. The other members were an admiral, a member of the *corps diplomatique*, a councilor of state, a director-general of the merchant marine, a naval port officer and a judge not inferior in rank to that of a councilor of a Court of Appeal—seven in all.[2]

The Chinese District Prize Court at Shanghai was composed of a president, eight judges, two procurators and two registrars. Four of the judges were taken from a High Court, two were naval officers and one was a special commissioner for foreign affairs.[3]

The Japanese Prize Court at Sasebo was composed of a president and eight councilors appointed from the following categories of persons: (1) judges, (2) naval flag officers, (3) councilors and enquirers of the navy department, (4) councilors of the legislative bureau, and (5) representatives of the foreign office and of the diplomatic and consular service.[4]

In Portugal, as has been said, the tribunal of commerce at Lisbon was designated as the court competent to render definitive judgments in prize cases; in Roumania the prize tribunal of first instance was composed of five members: one judge, who served as president, one official of the foreign office, one naval officer, one military officer and one representative of the chamber of commerce of Galatzi.[5]

In Russia the Prize Court was composed of a president and five members. The president was a member of the judicial maritime administration, having the rank of colonel or above. Of the other members, two were superior officers appointed by the minister of marine, two were judges appointed by the minister of justice and one was a functionary of the ministry of foreign

[1] See Sec. 66 *infra*.

[2] Decree of May 30, 1915 (Art. 2). French text in Fauchille and Basdevant, *Jurisprudence Ital. en Matière de Prises Maritimes* (hereafter cited *Jurispr. Ital.*). *Annexe*, p. v.

[3] Prize Court Rules of 1917 (Arts. 3-5). Text in *Judgments of the High Prize Court of the Republic of China*, App., p. 125.

[4] Imperial decree of Sept. 11, 1914, modifying decrees of 1904 and 1905. It appears, however, from the decisions of the lower Prize Court in the three cases decided by it that in one of them (the *Zuimo*) the decision was rendered by three judges and that in the other two (the *Eorus* and *the Christian Boles*) it was rendered by five judges.

[5] Decree of Sept. 18, 1917 (Art. 8). The decision of the Roumanian Prize Court in the case of the *Nicolae* (cited by Verziĭl, *Droit des Prises de la Grande Guerre*, p. 17) was annulled by the superior Prize Court because one of the judges was not qualified to sit as a member of the court.

affairs, appointed by the head of that ministry. The Siamese Prize Court of first instance consisted of three or more "judges" appointed by the King.[1]

Sec. 9. The Marshal of the British Prize Court. An important part of the machinery of the British Prize Court are the offices of marshal and registrar. The office of marshal appeared early in the history of the development of the prize jurisdiction, his duties at first being the execution of monitions, warrants, attachments and other orders of the Court. Later he came to be charged with the custody of prize property and with the duty of appraising and selling condemned prizes.[2] In consequence, largely, of the increasing number and value of prizes which were "droits of admiralty" these duties acquired an importance which they did not possess in the beginning. Under the existing rules and practice the marshal is charged with a variety of other duties: the service of writs and warrants, the making of applications to the judge for the removal, sale, custody or preservation of prize property, and the execution of the judge's orders thereupon; he pays into the Court the proceeds of the sale of condemned property, keeps accounts thereof and submits them to the Court for its examination, releases to claimants property ordered by the Court to be restored, and executes the orders of the Court generally.[3]

Sec. 10. The Registrar. At an early date the now important office of registrar also appeared as a part of the machinery of prize adjudication, the duties of which were the keeping of the records of the Prize Court, the issuing of official forms and the collection of fees. In the eighteenth century the registrar became the custodian of the proceeds of the sale of prizes and until 1813 he received personally the interest thereon.[4] In the latter part of the eighteenth century he was charged with ascertaining the amount of freight and demurrage due when such allowances were awarded by the Court and also the amount of costs, expenses and damages when they were allowed by the

[1] Decree of July 20, 1917 (Art. 6).
[2] Roscoe, *History of the English Prize Court*, p. 19.
[3] See the Prize Court Rules of 1914 as to these duties; also Tiverton's *Prize Law* (index). In the case of the *Cairnsmore: The Gunda* (IX Lloyd 374; III Br. & Col. Pr. Cas. 797) the Judicial Committee declared that it was the duty of the marshal to exercise all due care and diligence for the safety of goods placed in his custody but held that it was not his duty to insure them for the benefit of the owners and that if he insured them to cover his own liability the cost of such insurance was not chargeable to the claimants on release of the goods, unless they assented to the insuring of them.
[4] Roscoe, *op. cit.*, p. 18.

Court. Under the existing rules and practice, writs and warrants are issued out of his office, he advertises writs for condemnation and the fact of service, affidavits are filed with him, appearances are entered in his office, he has the custody of the ship's papers, he may administer oaths and receive affidavits, he reviews the marshal's accounts and reports to the Court the amount which he finds to be due the marshal, prepares bail bonds, issues instruments for the release of property, hears examination of witnesses when the Court so directs, keeps the records of the Court, etc. The Court is authorized by the Prize Court rules [1] to appoint one or more Trinity Masters or other assessors, on application of any party, or without such application if it thinks proper, to advise it upon any matters requiring nautical or other professional knowledge—an authority which was sometimes exercised by Sir Samuel Evans during the late war.

Sec. 11. The Prize Claims Committee. In consequence of the decisions of the Prize Court that British, allied or neutral mortgagees of enemy property or pledgees of bills of lading of enemy cargoes had no rights which were enforceable in a Prize Court,[2] the government very early in the war appointed a prize claims committee to consider the claims of third parties interested in ships or cargoes condemned by the Prize Court and to report to the government such cases as in its judgment were meritorious, in order that the Crown might in the exercise of its bounty redress, if it chose, hardships which the Prize Court held that as a court of law it had no jurisdiction to do.[3] The prize claims committee is said to have made it a rule to entertain no claims which could be supported in the Prize Court.[4] Among the claims which were paid out of the Treasury upon recommendation of the committee were: a claim for necessaries supplied by a coaling company (the *Adolf*); a claim for general disbursements on account of a ship (the *Concadoro*); a claim for wages to seamen (the *Australia*); a claim for dock dues (the *Ulla Boog*); and a claim for tonnage (the *Werner Vinen*)—all being expenditures made by the claimants before the war. Other claims of the kind were: mortgages of British subjects on German vessels (the *Emil*); advances made on the security of shipping docu-

[1] Order XVI.

[2] See for example, the cases of the *Marie Glaeser* and the *Odessa and Cape Corso, infra*, Sec. 293.

[3] See the Statement of the Attorney General in the case of the *Odessa* and *Cape Corso*, I Br. and Col. Pr. Cas., p. 166 N. 1, and the *Solicitors' Jour. and Weekly Rep.*, Dec. 12, 1914.

[4] The *Adolf and Other Vessels*, X Lloyd at p. 58.

ments (*Cargo ex Achaia*); liens of unpaid vendors (*Cargo ex Derflinger*); the claim of English ship brokers for commissions (the *Ulrich*),[1] etc.

Sec. 12. The Naval Prize Tribunal. By the Naval Prize Act 1918 provision was made for the establishment of a special body known as the Naval Prize Tribunal charged with determining whether in particular cases of capture the proceeds of the sale of condemned prizes were to be regarded as "droits of the Crown" and therefore payable into the Naval Prize Fund, which fund was to be devoted to the payment of prize bounty to the captors, or whether they were "droits of the admiralty" and therefore not payable into the said Fund. The tribunal was composed of three members under the presidency of Lord Phillimore [2] and it was called upon to render decisions in a considerable number of cases.[3]

Sec. 13. The Committee on Contraband Trade. In the early months of the war (November, 1914), the British government created a special inter-departmental body known as the contraband committee to examine and report upon claims for the release of cargoes detained where prize proceedings were not necessary and yet where the evidence of ownership was not sufficient to justify the Crown in consenting to their release. Of the institution of this committee and its work, Sir Edward Grey said:

"In order, therefore, to ameliorate the situation we established a special committee, with full powers to authorize the release of goods without insisting on full evidence of title being produced. This committee dealt with the utmost expedition with a large number of claims. In the great majority of cases the goods claimed were released at once. In addition to the cases dealt with by this committee a very large amount of cargo

[1] As to all these cases see the *Adolf and Other Vessels*, X Lloyd 54. In this case the Naval Prize Tribunal adverting to certain claims in respect of necessaries, wages, mortgages and other charges which the Prize Court had no jurisdiction to allow, said:

"The Treasury has paid, or will pay, the claims upon the recommendation of the prize claims committee. But they are confessedly not claims of a nature which could have been established in prize proceedings, and therefore they are not claims which would have been ordered by a Prize Court to be paid by anyone or out of any funds, and therefore we must disallow them. It is satisfactory to think that this decision follows the practice with regard to such matters as grants of prize in former wars. In cases where a claim was established by a third party as mortgagee, bottomry bond holder, or as having a lien on a parcel of cargo, the Crown made a grant to him of its bounty out of the national Exchequer, and not out of the proceeds of the prize, and the captors took the whole proceeds undiminished and free of any charge."

[2] The other two members were Admiral Callaghan and the Rt. Hon. Sir Guy Fleetwood-Wilson.

[3] See Secs. 29-31 *infra*.

was released at once by the Procurator-General on production of documents. Claimants therefore obtained their goods without the necessity of applying to the Prize Court and of incurring the expense involved in retaining lawyers, and without the risk, which was in some cases a considerable one, of the goods being eventually held to be enemy property and condemned."[1]

Sec. 14. Division of Jurisdiction as Between Different Prize Courts. Where a state set up more than one Prize Court, as was done in Germany, Great Britain and Russia, the jurisdiction of each court, over particular captures, by reason of the place, was regulated by national legislation. Generally this jurisdiction was determined on the basis of the port into which the prize was brought. In Germany the competence of each of the two Prize Courts was determined on the basis of the territorial jurisdiction of the prize office (*Prisenamt*) and the competence of the latter was determined by the port into which the prize was brought.[2]

The Prize Court at Hamburg was given special jurisdiction over prizes taken into foreign ports (for example the *Appam*, see Sec. 68 *infra*), of prizes which had been destroyed (for example the *Frye*, see Sec. 2, *supra*) and of prizes which had been released before their arrival in port.

In Great Britain the matter was more important by reason of the large number of courts throughout the Empire, upon which prize jurisdiction was conferred. By a special act of parliament of September 18, 1914, the jurisdiction of the Prize Courts in Egypt, Zanzibar and Cyprus was regulated. Aside from this special regulation, the jurisdiction of each Prize Court was determined by the port into which the ship was taken or seized or in which the cargo was seized. Captors were free to take their prizes into any port they chose, although Lord Parker in the case of the *Louisiana*[3] suggested that other things being equal the most convenient, the nearest available, and the least congested port should be preferred, providing the taking of the prize into such port would involve the least danger from the risks of war.

Sec. 15. Transfer of Cases from One Prize Court to Another. By the Prize Courts Act of 1915 it was provided that where proceedings were pending in any case against a ship or

[1] Spec. Supp. to 9 *Amer. Jour. of Int. Law* (July, 1915), p. 82. See also the observations of the Naval Prize Tribunal as to the function of this Committee, in *The Abonema and Other Ships*, III Br. & Col. Pr. Cas. at p. 305.
[2] Decision of the Imperial Chancellor July 20, 1917. *Reichsgesetzblatt* 1917, p. 638.
[3] V Lloyd 248; III Br. & Col. Pr. Cas. 61.

cargo, the Court might at any stage of the proceedings, on application of the Crown, transfer the proceedings, so far as they related to the cargo, to some other court, if it was satisfied that the proceedings would be more "conveniently conducted in any other Prize Court." It was in pursuance of this act that the case of the *Bangor* commenced in the supreme court of the Falkland Islands was transferred to the Prize Court of London and by it decided.[1] It was also, apparently, in pursuance of this act that the proceedings in the case of the *Roepat* and the necessary record thereof were transferred from the Natal provincial division of the supreme court of South Africa (at Pietermaritzburg) to the Prize Court at London.[2]

Sec. 16. Enforceability of Prize Court Orders in Other Jurisdictions. By section two of the above mentioned act it was provided that a Prize Court might upon application of the Crown declare that any order or decree made by it should be enforceable within the jurisdiction of any other Prize Court and should upon like application have power to enforce any decree or order which another Prize Court had declared to be enforceable within the jurisdiction of such first mentioned court. And by sec. 3 it was provided that where the proceedings were removed from one court to another, either court might direct that any expenses incurred in the removal should be borne by the cargo or ship. In the case of the *Erna Woerman*[3] the Cape of Good Hope provincial division of the supreme court of South Africa declined to order the transfer of the proceedings to the Prize Court at London for hearing there, for the reason that no application therefor had been made by the Crown. But in pursuance of Article 2 of the above mentioned act the court declared that the order for the sale of the cargo already made by the Court, was enforceable within the jurisdiction of the Prize Court at London and it directed that the sale of the goods then within the jurisdiction of the Court be removed for sale to the jurisdiction of the London Prize Court. It was further ordered that the expense incurred by the removal of the goods from South Africa to the jurisdiction of the Prize Court at London should be borne by the goods and that the proceeds of the sale be remitted to the South African court.

[1] V Lloyd 308; II Br. & Col. Pr. Cas. 206.
[2] Cases decided in the Prize Courts of South Africa, p. 103. So the proceedings in the case of the *Vulcan Coal Company* were transferred from the Prize Court for Egypt to the Prize Court at London (VIII Lloyd 146, note).
[3] *Ibid.*, p. 119.

But in the case of the *Hamm* and *Apolda*[1] the South African court refused an application for an order directing the sale of certain goods upon their arrival in Australia, for the reason that in the opinion of the court it had no power to enforce its orders outside its own territorial jurisdiction. Counsel argued that the Prize Court rules being the same throughout the Empire, there was no reason for assuming that The Court's order would not be enforced by the Australian authorities. The case of the *Cumberland*[2] (decided Jan. 18, 1915, by Sir Samuel Evans) was relied upon in support of the view that the aid of the Australian Prize Courts might be invoked to carry out the order, since the *res* was still within the jurisdiction of the Court. In denying the application judge Juta said:

"I do not see how any order which this court can make can have any authority in Australia, or that there is any power either to see that it is carried out: and no court makes orders which it has no power to enforce. If we make an order in regard to the sale of goods in Australia, as asked for, there is no possible means of compelling those orders to be carried out. Therefore, we do not think we can make any such order as is asked for. Mr. Struben has quoted the case of the *Cumberland,* but that referred only to removal from one place in the United Kingdom to another place in the United Kingdom, and, therefore, it does not apply here, where we are asked to deal with goods when no longer in our jurisdiction."

Sec. 17. Conflict Between British Prize Courts. A conflict of jurisdiction between two British Prize Courts was afforded by the case of the *Leonor.*[3] A motion having been made by the Crown in the Prize Court of British Columbia that certain proceedings be transferred to the Prize Court at London, the motion was adjourned to enable counsel for the Crown to make an election within a few days respecting the filing of further evidence. During the adjournment the Crown made an identical application to the president of the Prize Court at Ottawa three thousand miles distant, and the order applied for was issued. The judge of the British Columbia court on learning the facts was highly indignant, treated the order issued by the Ottawa judge as of no validity, on the ground that he had no jurisdiction, and wrote a long opinion in which he denounced the conduct of his Ottawa colleague as an intrusion, an act of

[1] *Ibid.*, p. 41.
[2] II Lloyd 165.
[3] III Br. & Col. Pr. Cas. 91.

usurpation and an attempt to interfere with the lawful authority of a brother judge of coördinate jurisdiction.

Sec. 18. Jurisdiction in Case of Joint Captures. In a war such as the late conflict was, in which the fleets of various allied powers coöperated in the prosecution of common naval operations and where, in consequence, captures were sometimes made by the joint naval forces of two or more powers, an understanding was necessary as to the particular Prize Court which should have jurisdiction. Furthermore it might happen that where a ship flying the flag of one of the allied powers was captured by a war vessel of the other, a difference of opinion would arise as to the true nationality of the captured vessel. An agreement on these points was embodied in a convention between Great Britain and France of November 9, 1914, to which Russia and Italy subsequently adhered.[1] The convention provided that in principle the jurisdiction over enemy or neutral prizes belonged to the Prize Court of the captor without regard to whether he was under the orders of the naval authorities of one or the other of the allied powers. Departure from this rule, however, might be made under exceptional circumstances by a special agreement between the parties interested.[2] In the case of the capture of a merchant vessel of one of the allied powers, jurisdiction should belong always to the Prize Court of the country of the captured ship, the cargo in such a case, following as regards jurisdiction, the fate of the ship.[3] In the case of a capture made by the joint naval forces of two or more allied powers, the jurisdiction should be that of the country whose flag is borne by the superior officer in command during the action.[4]

[1] Text in 22 *Rev. Gén. de Droit Int. Pub.* (1915), *Docs.* pp. 35 ff. and in Fauchille, *La Guerre de 1914*, t. I, p. 112.

[2] The *Pao-Hing-Lie* (Fauchille, *Jurispr. Franc.* 438) was an example of such a case.

[3] This provision was interpreted by the French Prize Council in the case of the *Narrovian* (Fauchille, *Jurispr. Franc.* 68) from which it appears that subsequent to the conclusion of the Convention there had been an exchange of notes between the British and French governments to the effect that where the vessel was released, the Prize Court of the country whose authorities had seized the cargo, should have jurisdiction over the cargo.

[4] A case of this kind was afforded by the capture of the *C. Ferd. Laesz* by a French cruiser which was acting under the order of an English commander. Fauchille, *Jurispr. Franc.* 202. There were a good many other cases of joint capture, especially by the British and French forces, which were the subject of prize adjudication. See among others the cases of the *Cydnus* (Fauchille, *Jurispr. Franc.* 176), the *Seyhoun* (*ibid.*, 174), the *Kaced Kerim* (*ibid.*, 240), the *Maria* (*ibid.*, 205), etc. Prior to the adherence of Italy to the Convention referred to above, the Italian Prize Commission was called upon to judge the validity of a number of captures made by French torpedo boats which had been placed at the disposition of the Italian forces to coöperate with them in the maintenance of the blockade

Sec. 19. Tribunals of Appeal. Great Britain. In all the belligerent countries in which prize tribunals were set up during the late war provision was made for a tribunal of appeal.[1] In Great Britain this tribunal is the Judicial Committee of the Privy Council, which consists of a small body of law lords, most of whom hold or have held high judicial office in the Kingdom or in the dominions.[2] Curiously enough its decisions take the form not of judgments but of "humble advice" to the King as to what ought to be done, that is, whether the decision of the Prize Court should be affirmed, modified or annulled, with a full statement of the reasons on which its conclusions are based. They amount in effect, however, to judgments since its "advice" is never in fact disregarded and indeed it may be doubted whether under the existing constitutional system it could be disregarded.[3] Originally an executive body in large measure, and lacking independence in the exercise of prize jurisdiction, it has steadily developed into a judicial tribunal with power to hear appeals and render what amounts to judgments in prize matters exactly as it does in the case of admiralty appeals and appeals from the highest courts in the Colonies, in India and in the Dominions.[4]

In France appeals may be taken from the decisions of the Prize Council to the Council of State sitting in general administrative assembly (not as a *conseil du contentieux*), which acts upon the report of its section on legislation, justice and of foreign affairs. In legal theory the appeal is to the President of the Republic to whom belongs the right of final decision. The decision of the Council of State is merely an *avis*, a recommendation, and

of the Adriatic Sea. See, among others, the cases of the *Aghios Spiridon* (Fauchille et Basdevant, *Jurispr. Ital.*, 4), the *Aghia Elene* (*ibid.* 17), the *Posseidon* (*ibid.*, 21) and the *Aghios Caralambos* (*ibid.*, 11). By an agreement of June 1, 1916, between Great Britain and France it was provided that a part of the goods going to or coming from Germany, as well as contraband generally, found in neutral mails and seized in pursuance of the Order in Council of March 11, 1915, should be sent to France for examination and for condemnation or detention, as French law might provide. See the cases cited by Verzijl, *op. cit.*, p. 312.

[1] The legislation of Greece alone, among the belligerents in the late war, appears to have made no provision for an appellate jurisdiction in matters of prize, but since no prize courts appear to have been constituted in that country during the World War the statement made above that in the countries where prize tribunals were actually established provision was made for appeals remains true. See also the qualification as to Italy *infra*, Sec. 21.

[2] Lowell, *The Government of England*, II, 467. From three to five Lords participated in the hearing of the cases appealed to the Committee during the late war. The opinions were most frequently delivered by Lords Parker or Sumner, and less frequently by Lords Mersey and Parmoor and Sir Arthur Channell.

[3] Compare Phillimore, *Int. Law*, III, 664.

[4] Roscoe, *History of the English Prize Court*, pp. 91-93.

not an *arrêt* or judgment and it takes the form of a decree promulgated by the President of the Republic. It is therefore analogous to the "advice" of the Judicial Committee of the British Privy Council in prize procedure. The reason for this is found in considerations of diplomatic or public policy. The Prize Council may be obliged to condemn a prize because the law so requires, but its confiscation may not be expedient for reasons of public policy, in which case the President of the Republic may, on appeal, decree the release of the prize. The Council of State, it may be observed, may, unlike the Prize Council, base its decisions upon considerations of expediency rather than of law.[1]

Sec. 20. The Same. Germany and Austria-Hungary. The German Superior Prize Court (*Oberprisengericht*) was composed of seven judges, of whom the president and two other members were required to be learned in the law, one a naval officer, one a representative of the ministry of foreign affairs, one a representative of the shipbuilding industry and one a representative of maritime commerce.[2] Unlike the English Judicial Committee and the French Council of State it is an *ad hoc* tribunal which is only brought into existence at the outbreak of war.

The Austro-Hungarian Prize Court of appeal (*Oberprisengericht*) during the late war was composed of a flag officer of higher rank who acted as president, two high officers of the judicial service of the marine, a legal representative of the ministry of foreign affairs, and two persons designated by the Austrian and the Hungarian ministries of commerce.[3]

Sec. 21. The Same. Other Countries. In Belgium the court of appeal at Brussels was designated to serve as the tribunal of appeal in prize cases.[4] In China a "high Prize Court" was established at Peking to hear appeals from the district Prize Court at Shanghai. It was composed of a president and eight judges to which were attached two procurators and two registrars. To serve as members of the high Prize Court there were designated three judges of the supreme court of the Republic, two officers of the navy, one councillor of the ministry of

[1] Worms, article cited p. 102.

[2] *Prisengerichtsordnung*, Sec. 6. See also Huberich, "German Prize Law," 59 *Solicitors' Journal and Weekly Reporter*, p. 70; and Huberich and King, 18 *Columbia Law Review*, 503.

[3] *Prisengerichtsordnung*, Sec. 3. See also Huberich, "The Austro-Hungarian Prize Courts, 59 *Solicitors' Journal and Weekly Reporter*, p. 438.

[4] *Loi organique du Conseil des Prises*, Aug. 26, 1919, modified by the law of Aug. 17, 1920 (Art. 23).

the navy, one of the ministry of foreign affairs and one representative of the legislative bureau.[1]

The Italian decree of May 30, 1915 (Art. 10) constituting the Prize Commission [2] declared that the decisions of the commission were not to be the subject of appeal, opposition or annullment and that they could only be submitted by way of recourse to the Court of Cassation at Rome in accordance with the terms of Article 3 of the merchant marine law of March 31, 1877. So far, therefore, as appeals were allowed at all the Court of Cassation was the tribunal to which they were taken.

In Japan a "higher Prize Court" to hear appeals from the lower Prize Court at Sasebo was provided for by a decree of September 11, 1914. It was to be composed of a president (who was required to be a privy councilor) and eight councilors, one of whom had to be a privy councilor, two naval officers, three judges of the Court of Cassation, one director of the legislative bureau and one director of the bureau of political affairs of the foreign office.[3]

In Portugal the supreme tribunal of justice served as the court of appeals in prize cases.[4] In Roumania a superior court of prize composed of seven members and including various functionaries, naval officers and representatives of the commercial interests was constituted by a decree of September 18, 1917. The Russian supreme Prize Court was formed by the adjunction to the council of admiralty of two senators and a representative of the ministry of foreign affairs.

In Siam appeals from the decisions of the Prize Court were allowed to the Judicial Committee of the Privy Council (the "Dika Court") but its decisions required the approval of the King to be valid.[5]

Sec. 22. Differences of Organization. The above outline of the organization of the prize jurisdiction in those countries in which prize tribunals were set up during the late war, reveals

[1] Prize Court Rules of 1917, Secs. 5 and 6. Text in Cheng, *Judgments of the High Prize Court of the Republic of China*, p. 125. List of the judges *ibid.*, pp. 1-2.

[2] French Text in Fauchille and Basdevant, *Jurisprudence Italienne*, App. p. V.

[3] Imperial decree of Aug. 20, 1894, modified by decrees of March 7, 1904, February, 1905, and Sept. 11, 1914 (Art. 3). It appears however, from the decision in the case of the *Zuimo*, the only Japanese case heard upon appeal during the World War, that the court of appeal was actually composed of eleven judges.

[4] Decree-law of Aug. 14, 1916 (Art. 5).

[5] Decree of July 20, 1917 (Art. 6). See also Verzijl *Le Droit des Prises de la Grande Guerre*, p. 16.

the existence of certain marked differences in their constitution and organization.

In the first place, it will be noted that except in England where a single judge constitutes the court, the prize tribunals were collegially organized, that is, they were composed of a number of members varying from two in Egypt to nine in China and Japan.

In the second place, it will be observed that most of the prize tribunals were *ad hoc* in character being especially constituted at the outbreak of war by the side of the existing courts and composed of members appointed for the specific purpose of exercising the prize jurisdiction. The British Prize Courts constituted a marked exception in this respect. In England the Prize Court is a permanent tribunal already in existence when war breaks out and no authority or formality other than a commission is necessary to enable it to proceed in the hearing and determination of prize cases. Likewise in the British overseas dominions and colonies the existing courts are utilized to exercise the prize jurisdiction. British Prize Courts both of first instance and of appeal are therefore, unlike those of most countries, not specially constituted *ad hoc* organs but existing tribunals upon which the right of prize jurisdiction devolves almost automatically upon the outbreak of war or which are designated by executive order to exercise it.[1] This system is also in existence in Portugal where the prize jurisdiction in first instance is exercised by the tribunal of commerce at Lisbon and upon appeal, by the supreme court of justice. It is also the system adopted by a few other countries in respect to the organization of the *appellate* jurisdiction in matters of prize. Thus in France the tribunal of appeals is the Council of State or rather a section of it; in Belgium it is the Court of Appeals at Brussels; in Italy it is the Court of Cassation at Rome; and in Siam it is the Judicial Committee of the Privy Council, although in all these countries the prize tribunals of first instance are specially constituted *ad hoc* bodies.

The most fundamental difference in the constitution of Prize Courts is to be found in the character of their personnel or composition. Those which were set up during the World War may be grouped in three classes. First, those which were composed wholly of professional judges and were therefore judicial courts

[1] The organization of the prize jurisdiction in the United States is similar to that of Great Britain, the Federal district courts having original jurisdiction in matters of prize and the Supreme Court being the court of appeal.

in the strict sense of the term. In this class belong the British Prize Courts, including the Judicial Committee of the Privy Council[1]; that of Portugal and the Prize Courts of appeal in Belgium, Italy and Siam.

Second, those which were composed entirely of administrative functionaries and naval officers and in which the purely professional judicial element was entirely lacking. To this class belong the French Prize Council, all the members of which were *maîtres des requêtes* of the council of state or high officials in the ministries of marine and of foreign affairs.[2]

Third, those of a mixed character; that is, those which were composed in part of professional judges, of high civil functionaries, of naval officers, of representatives of the shipping and commercial industries, etc. To this class belong the Prize Courts of Austria-Hungary and Germany, both of first instance and of appeal, the Prize Council of Belgium, the district and supreme Prize Courts of China and Japan, the Prize Commission of Italy, and the inferior and supreme Prize Courts of Roumania and Russia.

Sec. 23. Merits and Demerits of the Different Types. Of the merits of each of these systems there is naturally a difference of opinion. Anglo-American jurists maintain that since Prize Courts, like other judicial tribunals, are charged with the interpretation and application of rules of law and with administering justice between contending parties, there is no more reason why this task should be entrusted to other persons than legally trained, experienced judges in one class of cases than another.[3] Moreover, in consequence of the greater training and experience which English prize judges have, in comparison with those of continental Europe, their judgments are better reasoned, more instructive and more authoritative.[4] Continental jurists on the other hand, while recognizing the value of the professional judge in a court charged with interpreting and administering the law of maritime prize, believe that in view of the special and technical character of this branch of law there is a distinct advantage in associating with the professional judge

[1] To this class the Prize Courts of the United States and of the Netherlands also belong.

[2] In this class belongs also the Prize Court of Spain.

[3] Compare Sir Francis Piggott "The Relations of the Prize Court to Belligerent Policy," III, *Grotius Society, Problems of the War*, at pp. 111 and 118, where that learned jurist impliedly criticizes the continental prize tribunals on the ground that they are not judicial courts but administrative councils, commissions, etc.

[4] Compare Baty, *Britain and Sea Law*, p. 19.

other persons who possess special knowledge of maritime, commercial, naval and other matters such as Prize Courts have to deal with.[1] By means of the mixed system therefore the learning of the judge in matter of law is supplemented by the knowledge of the expert upon other questions which are equally involved, and consequently the reaching by the Court of sound conclusions is more likely. The French system under which the prize tribunal is an administrative body wholly lacking in the purely judicial element would seem to have the least to commend it.[2]

III

Conclusiveness of Prize Judgments

Sec. 24. Effect of Prize Adjudication.

"It has long been settled by diplomatic usage," said Lord Parker in the case of the *Zamora*,[3] "that in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognizable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of these courts are such as to amount to a gross miscarriage of justice. It is obvious, however, that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the executive of the belligerent Power."

As a general principle, a definitive judgment by a national Prize Court having proper jurisdiction is, in the absence of an international tribunal, conclusive and binding upon the parties

[1] Compare in this sense F. deMartens, *Traité de Droit Int.*, t. III, Sec. 125, and De Boeck, *op. cit.*, Sec. 336. Fauchille (*op. cit.*, Sec. 1431) without expressing an opinion remarks that in every case of prize there is a *legal* question, that of the validity of the capture, and also a preliminary *political* question, the expediency of confiscation. To the same effect, De Boeck, See 335.

[2] But it is defended by M. Worms, who was a member of the French Prize Council during the late War. If, he says, the two members representing the marine are in favor of upholding the doubtful validity of a capture made by the naval forces, as they might naturally be expected to be, the two members representing the ministry of foreign affairs who by their habits and experience are accustomed to negotiation and compromise, would be inclined to release the prize, while the two members from the Council of State, whom M. Worms considers as professional judges in the Anglo-American sense, would hold the balance. In short, the different habitudes of mind and training found in a body so constituted would serve as a counterpoise, one against the other, and the conclusion would be an embodiment of sound law and good policy. Article cited *Revue des Deux Mondes*, Nov., 1915.

[3] IV Lloyd 62; II Br. & Col. Pr. Cas. at p. 13.

whether it is well-founded or not. It terminates the controversy between the captor and the claimant and establishes their respective legal rights in respect to the property claimed.[1] No foreign state and no other judicial or administrative authority can review the judgment. Nevertheless, a state is ultimately responsible for the decisions of its Prize Courts as it is for the acts of its other authorities and it cannot plead a judgment in bar of the diplomatic presentation of a claim by a foreign government for a modification or annullment of the judgment, if it was based upon an erroneous interpretation or disregard of an established rule of international law, or is manifestly unjust and the result is to deprive the nationals of a neutral state of their recognized rights.[2] In short, the judgment of a Prize Court is not necessarily and should not be conclusive where the rights of neutrals are involved; it can only be regarded as conclusive when it is in conformity with the generally recognized rules and principles of international law.

Since Prize Courts apply municipal as well as international law and are in fact bound by the rules of the former when they conflict with the latter [3] it may happen that their decisions are not in accord with international law. If they were bound to give effect to rules of international law where they are contrary to municipal law and to disregard the latter the principle laid down above would be otherwise.[4]

In practice, protests have frequently been made by foreign governments against the decisions of Prize Courts and in some instances the decisions have been submitted to the review of an international tribunal or commission or were set aside or modi-

[1] If, however, the prize is not in the possession of the captor state, but is in that of another state (see, for example, the cast of the *Appam*, Sec. 68, and the cases of the German ships condemned by the Belgian Prize Council while they were in Dutch waters, Sec. 66), it may be impossible to give effect to the judgment of the Prize Court when it is a judgment of condemnation.

As to the effect of the judgment of a Prize Court, see the Belgian cases of the *Zaanstroom* and the *Agiena*, where it was said that one of the most essential rules (of prize law) is that the decision of a Prize Tribunal which upholds the validity of a capture is that its effect is to deprive the owner of his right of property in the ship and to transfer this right to the captor state and that it belongs to the Prize Court, to the exclusion of every other foreign court, to determine the legality of the capture.

[2] As to this see Fauchille, *Droit Int. Pub.* (8th ed.), t. II, p. 587; Dupuis, *Le Droit de la Guerre Maritime d'Après les Doctrines Anglaises Contemporaines*, p. 404; De Boeck, *op. cit.*, Sec. 335; Oppenheim, *International Law* (3rd ed.), Vol. II, Sec. 437; Bluntschli, *Droit Int. Cod.*, Arts. 50-51; Wheaton, *Int. Law* (4th ed.), p. 535; Lawrence, *Prins. of Int. Law* (4th ed.), p. 479; Pyke, 32 *Law Quar. Review*, 149; and Moore, *Digest of Int. Law*, Vol. VI, p. 667.

[3] Secs. 126 ff. *infra.*

[4] Compare as to this Borchard, 28 *Yale Law Journal* 583.

fied by the government whose Prize Courts had rendered them.[1]

Sec. 25. Diplomatic Intervention *versus* Prize Adjudication. During the late war a controversy arose between the governments of the United States and Great Britain in regard to the question whether neutrals who claim to be deprived of their rights by the alleged unlawful acts of a belligerent are bound to exhaust the remedies provided by the Prize Court before invoking the diplomatic intervention of their government. Sir Edward Grey in a note of February 10, 1915, to the American ambassador at London,[2] replying to a note of the American Secretary of State, in which various complaints were made of unlawful interferences on the part of Great Britain with American trade, said:

"It is the common experience of every war that neutrals whose attempts to engage in suspicious trading are frustrated by a belligerent are wont to have recourse to their government to urge that diplomatic remonstrances should be made on their behalf, and that redress should be obtained for them in this way. When an effective mode of redress is open to them in the courts of a civilized country by which they can obtain adequate satisfaction for any invasion of their rights which is contrary to the law of nations, the only course which is consistent with sound principle is that they should be referred to that mode of redress, and that no diplomatic action should be taken until their legal remedies have been exhausted, and they are in a position to show *prima facie* denial of justice.

"The course adopted by His Majesty's Government during the American Civil War was in strict accordance with this principle. In spite of remonstrances from many quarters, they placed full reliance on the American Prize Courts to grant redress to the parties interested in cases of alleged wrongful capture by American ships of war, and put forward no claims until the opportunities for redress in those courts had been exhausted. The same course was adopted in the Spanish-American War, when all British subjects who complained of captures or detentions of their ships were referred to the Prize Courts for relief."

In the following year the controversy was renewed in connection with the "Maritime Rights Order in Council" of July

[1] Among more recent instances may be mentioned the American Civil War cases (the so-called "Matamoras Cases") which under the Treaty of Washington of 1871 were submitted to the review of an international tribunal, the case of the *Gherardine* during the Franco-German War where the French government released a prize which had been condemned by the Council of Prizes (De Boeck, *op. cit.*, p. 351), and the case of the *Luxor*, where a German vessel condemned by a Peruvian court during the war between Chile and Peru in 1879, was upon the demand of the German government, released (Oppenheim, *op. cit.*, II, p. 633). For other cases see Colombos in Report of the *Thirtieth Conference of the International Law Association* (1921), Vol. I, p. 34.

[2] Text in Spec. Supp. to 9 *Amer. Jour. of Int. Law* (July, 1915), pp. 65 ff.

7th, 1916, which the American Secretary of State characterized as being "at variance with the law and practice of nations in several respects" and who affirmed that the "United States reserves all of its rights in the premises, including the right not only to question the validity of these rules but to present demands and claims in relation to any American interests which may be unlawfully affected directly or indirectly by the application of those rules." [1] To this communication the British foreign office replied that if the rules of the Order in Council were "not deemed by the United States to be in accordance with international law they should be challenged in the Prize Court." [2] To this suggestion the Secretary of State replied that "of course the United States has no intention to resort to British courts for the maintenance of such of its national rights as may be infringed by Orders in Council of Great Britain." [3]

Throughout the controversy the position maintained by the United States was that a neutral government is not obliged to leave its citizens to exhaust the remedies afforded by the Prize Courts of the belligerent whose alleged unlawful acts have deprived them of their rights but that it has a right to espouse and prosecute their claims for damages through the diplomatic channel without regard to the decisions of the Prize Courts. It called the attention of the British government to several instances during the American Civil War when the British government demanded through diplomatic channels damages for seizures and detentions of British vessels alleged to have been made without legal justification, several of the demands being made while the claims were before the American Prize Courts.[4]

The British foreign office, however, asserted that these cases established the very proposition for which it was contending, namely, that in cases where the Prize Court has power to grant relief there is no ground for diplomatic intervention and it

[1] Mr. Lansing to Chargé Laughlin, Sept. 18, 1916, Spec. Supp. to 11 *Amer. Jour. of Int. Law*, p. 1.
[2] *Ibid.*, p. 2.
[3] *Ibid.*, p. 2. In a note of July 14, 1915 (Supp. to 9 *ibid.*, p. 153), the Secretary of State instructed Mr. Page to inform the British government that "in so far as the interests of American citizens are concerned, the government of the United States will insist upon their rights under the principles and rules of international law as hitherto established . . . without limitation or impairment by Orders in Council or other municipal legislation by the British government, and will not recognize the validity of Prize Court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law."
[4] The Secretary of State to Mr. Page, Oct. 21, 1915, Spec. Supp. to 10 *Amer. Jour. of Int. Law*, at p. 85.

pointed out that while in two of the instances cited by the American Secretary of State, the United States government discontinued the prize proceedings and admitted the right of compensation; in the others the proceedings in the Prize Court were continued and the British government acquiesced in its decisions.[1]

Sec. 26. When Prize Court Decisions Reviewable. But while the British government maintained that neutrals who claimed that their rights had been infringed upon must first exhaust the remedies provided by the establishment of the Prize Court and that it was open to them to contend that the Orders in Council complained of were inconsistent with the principles of international law and therefore not binding upon the Prize Court, it admitted that if the Court declined to accept such contention and its decisions were upheld by the Judicial Committee of the Privy Council, on appeal, and the government of the United States considered that the decisions were incorrect and in violation of the rights of American citizens, it was then open to the American government to claim that they should be "subjected to review by an international tribunal." This principle, that the decisions of national Prize Courts may "properly be subject to international review," had, it was added, been conceded by Great Britain in Article 7 of the Jay Treaty of 1793 and by the United States in the treaty of Washington of 1871. In the present case if the Prize Court and the Judicial Committee, on appeal, should hold that the Orders in Council and instructions of the British government in matters relating to prize were in harmony with the principles of international law and the United States government should maintain a contrary view, "His Majesty's government will be prepared to concert with the United States government in order to decide upon the best way of applying the above principle to the situation which would then have arisen." [2]

[1] *Ibid.*, pp. 140 and 142 ff.

[2] Sir Edward Grey to Mr. Page, July 31, 1915, Spec. Supp. to 9 *ibid.*, 163. As to the controversy between the British and American governments in the case of the *Wilhelmina* see *ibid.*, pp. 176 ff. In this case the American government protested against the institution of prize proceedings against the cargo on this vessel, on the ground that the cargo (consisting of foodstuffs) was not subject to seizure as contraband because it was not destined for the use of a belligerent government or its armed forces. The British government, however, maintained that the legality of the seizure was a proper question for prize adjudication and it added that, if the owners of the cargo desired to question the validity under international law of the action taken by the British government "they would have every opportunity of establishing their case in due course before the Prize Court." The American government should therefore await the result of the Prize Court proceedings before having recourse to diplomatic intervention. Assurance was given that if the

It does not appear that the decisions of any Prize Court during the late war were submitted to review by an international tribunal.[1] But instances were not lacking in which vessels or cargoes condemned by the Prize Courts were upon the demand of interested governments released or compensation made for the goods thus condemned.[2]

Sec. 27. The Same. Cases During the World War. It may be observed in this connection that Article 440 of the Treaty of Versailles obliged Germany to accept and recognize as valid all decisions of the Prize Courts of the allied and associated powers, so far as they related to German ships and cargoes and the payment of costs in connection with prize proceedings, and to renounce any claim arising out of such decisions, on behalf of any German national. On the other hand, the allied and associated powers reserved the right to examine all decisions and orders made by the German Prize Courts, whether they affected the property rights of the nationals of those powers or of neutral powers and Germany agreed to furnish copies of all the docu-

goods were found by the Prize Court to be contraband the owners would be "equitably indemnified." In the Chicago Packing House cases (the *Kim and Other Vessels*) pressure was brought by the claimants upon the American government to insist upon a settlement through the diplomatic channel rather than to leave it to the decision of the British Prize Court. Judge Simeon E. Baldwin, adverting to this demand, observed that it was "opposed to our whole policy from the beginning of our national history." And he added, "by that we have always, in dealing with countries having similar institutions to our own and courts which have won general confidence as real tribunals for the administration of justice, been ready to wait until those courts have spoken their last word, before our Executive Department finds fault with their government for its course of action." 9 *Amer. Jour. of Int. Law* (1915), p. 800.

[1] But the decisions of the Belgian Prize Council condemning and confiscating for the benefit of the Belgian State German ships while interned in the river Scheldt within the jurisdiction of the Netherlands were in effect overruled by the action of the allied powers at Spa in July, 1920. See Sec. 67, *infra*.

[2] See, for example, the case of the *Silesia*, an Austro-Hungarian merchant vessel which was condemned by the Chinese Prize Court (*Judgments of the High Prize Court of the Republic of China*, p. 88), which subsequently became the property of a Chinese citizen who leased it under the name of the *Hwayih* to the government of Czecho-Slovakia and while in the port of Trieste at the end of the year 1919 (then Italian territory) it was put under sequestration and by a decision of the Italian Prize Commission was awarded to its original owners. Against this decision the Chinese government protested on the ground that the vessel had been regularly condemned by a Prize Court of China, that the matter was *res judicata* and consequently the Italian Prize Court had no jurisdiction to review the decision. The Italian government recognized the justice of the Chinese position and released the vessel. Fauchille, *op. cit.*, t. II, p. 587.

As is well known the British government compensated in large measure the owners of the cargoes on the *Kim* and other vessels, although they had been condemned by the Prize Court as good and lawful prize. In fact, 90 per cent of the proceeds of the condemned cargoes (in some cases 95 per cent) were paid to them. *The American Meat Packers' Agreement*, VIII Lloyd 473.

ments constituting the record of the cases and to accept and give effect to the recommendations made after such examination of the cases. A similar provision was embodied in the treaties with Austria (Art. 378), with Bulgaria (Art. 296) and with Hungary (Art. 361).

In the case of the *Gelderland*[1] a Dutch ship which had been condemned by the German Prize Court and subsequently recaptured by the Belgian naval forces in the port of Zeebrugge and made the object of prize proceedings before the Belgian Prize Council, the original Dutch owners invoked the clause of Article 440 of the Treaty of Versailles relative to the examination by the allied and associated powers of the decisions of the German Prize Courts when they affected the rights of nationals of neutral powers. The Prize Council, however, held that Article 440 did not apply to ships captured by Germany and subsequently recaptured by an allied power; that it was not the intention of the article to confer upon the prize tribunals of the allied and associated powers authority to reëxamine the decisions of the German Prize Courts, but that this reëxamination was a governmental or diplomatic matter and since the Belgian government had not exercised its right of examination under the treaty, the decision of the German Prize Court condemning the ship must stand. Having been recaptured by the Belgian forces it was a lawful prize and was condemned as such by the Belgian Prize Council.

IV

Rewards for Naval Success

Sec. 28. Prize Bounty. In Great Britain the jurisdiction of the Prize Court includes the power to determine whether in a particular case of capture the captors are entitled to prize bounty. By section 42 of the Naval Prize Act, 1864, and the Order in Council of March 2, 1915, issued in pursuance thereof, the officers and crews of such British war ships as were actually present at the taking or destroying of an enemy armed ship were entitled to have distributed among them as prize bounty a sum calculated at the rate of £5 for each person on board the

[1] Text in 47 *Rev. de Droit Int. et de Lég. Comp.* (1920), pp. 125 ff.; also *Moniteur Belge*, Oct. 30, 1919, p. 5773.

enemy ship at the beginning of the engagement.[1] The Prize Court was given jurisdiction to interpret this legislation and to judge on the basis of the facts in each particular case whether the conditions under which prize bounty was allowable were present. In the case of the *Sydney* [2] Sir Samuel Evans declined to place a "too narrow construction" upon the words "on board" and awarded prize bounty in respect of members of the crew of an enemy ship (the *Emden*) destroyed by an Australian man-of-war, who although they were not actually "on board" at the beginning of the engagement were in fact in attendance in some form or other, or, as part of the enemy crew, were engaged in work connected with the service on which the enemy vessel was

[1] Before the World War it was the practice in England for the Crown to whom a prize had been condemned to distribute the proceeds among those immediately responsible for the capture. The practice, however, was open to the objection that it worked injustice to others who rendered equally important services in naval warfare, and who went unrewarded (see the remarks of Sir John Simon in the case of the *Chile*). Accordingly, by an Order in Council of Aug. 28, 1914, the existing practice was abolished (Supp. to the London *Gazette*, Aug. 28, 1914), and it was announced that in lieu of the old system of distribution there would be established a system of bounties and gratuities. The new system was put into effect by an Order in Council of March 2, 1915, referred to above (London *Gazette*, March 2, 1915). Under the old practice the sums received by captors were sometimes fabulous in amount, a writer in the London *Times* citing an instance in which a captain's share amounted to £40,000 and that of every man on board to £200.

[2] V Lloyd 288; II Br. & Col. Pr. Cas. 231. As stated in the preceding note the old British practice was to award the prize in its totality to the captors. As was said in the *Oscar II* (X Lloyd 273): "In the old days . . . the captor brought his capture into the Prize Court, and if he got condemnation, he put the value of it into his pocket." Germany, on the contrary, never adopted the practice of awarding the captors a share of the prize, but during the World War liberal bounties appear to have been accorded naval commanders or seamen, especially of submarines. The Belgian, Chinese, and Japanese Prize Court regulations declare that condemned prizes shall be the property of the State. By a French law of March 15, 1916, the total proceeds of condemned prizes were to be paid into a special fund to be distributed as indemnities to invalided or wounded officers and seamen and their widows and orphans. Before the enactment of this law the French Prize Council in pursuance of the existing legislation condemned the prizes "for the benefit of the captor officers and crew" (the *Porto* and the *Barmbek*), but after the enactment of the law of 1916 they were adjudged to "the *ayant droit* conformably to the laws and regulations in force" (the *Frieda Mahn*). By the Italian Rules of Mar. 25, 1917, the proceeds were put at the disposition of the minister of marine who was authorized to grant, according to special circumstances, a share of the prize to the captors. In every case, subject to one exception, one-fifth of the value of the prize had to be paid into the invalid fund for the benefit of invalid and wounded seamen (Arts. 110-111). By later decrees the captors were allowed 2 per cent of the value of Austrian prizes destroyed (Verzijl, *op. cit.*, p. 223). By a Siamese decree of July 20, 1917, the whole matter of granting prize money was left to the decision of the King.

The distribution of the proceeds of condemned ships and cargoes captured by the joint forces of two or more allied powers was regulated by Art. 5 of the Convention of Nov. 9, 1915, between Great Britain and France to which Italy and Russia subsequently adhered (See Sec. 18 *infra*). Application of the article was made by the French prize council in the cases of the *Corcovado* and the *Oscar II*, 27 *Rev. Gén.* (1920), *Jurispr.* 60, 85.

employed. In this case 52 members of the crew of 397 persons on the *Emden* had been sent ashore to destroy the telegraph apparatus on land. Sir Samuel held that as they were doing part of the work which the *Emden* was set to do they must be treated as being "on board" and the captors were entitled to prize bounty calculated on the basis of the total number of persons on board the destroyed ship. Likewise Sir Samuel awarded prize bounty to all the ships present at the battle of the Dogger Bank at which the German armed cruiser *Blücher* was destroyed, although some of them did not actually take part in the engagement.[1] But Sir Henry Duke appears to have taken a less generous view and held that only the parties engaged in the actual capture or destruction were entitled to prize bounty.[2]

In the case of the *Submarine E14*[3] Sir Samuel interpreted the words "armed ship" to refer only to a fighting unit of the fleet, that is, a ship commissioned and armed for offensive action in a naval engagement and that in the absence of proof that she was so armed, prize bounty was not allowable in respect of the destruction of an enemy (Turkish) auxiliary (the *Guj Djemal*) which, at the time of her destruction, was being used as a troop transport. The ship had on board 6000 enemy troops at the time she was destroyed, she carried rifles and field guns, whether in the hold or on deck was not clear, and she was manned by naval seamen and was commanded by officers of the enemy navy. She was undoubtedly an auxiliary ship, but Sir Samuel did not think that these facts necessarily made her an "armed" ship. Upon a rehearing of this case Sir Samuel's successor, Lord Sterndale, reached the same conclusion as his predecessor. But evidence being produced at the second hearing that the *Guj Djemal* was in fact armed with six light quick-firing guns and that the field guns which she carried were so placed that they could be used for attack and had in fact been so used against British submarines, the Judicial Committee, on appeal, reversed the judgment of the Prize Court.[4] Lighters and barges which had no armament structurally attached to them but which carried troops provided with arms capable of being used for the destruction of the vessels against them, were held by Sir Henry

[1] *Battle of the Dogger Bank*, VII Lloyd 125.
[2] The German Submarine *UB 17*, X, *ibid.*, 309.
[3] VI Lloyd 306; II Br. & Col. Pr. Cas. 404. In this case and that of the *Carmania* (*infra*) Sir Samuel gave a review of the history and development of the English practice of granting prize bounty or head money, beginning with the year 1649.
[4] VI Lloyd 322; III Br. & Col. Pr. Cas. 568.

Duke to be "armed vessels" and prize bounty was therefore due for their capture or destruction.[1] The same view was taken regarding enemy sailing vessels whose crews were armed with rifles; and they did not cease to be "armed vessels" in the sense of the prize bounty act when they were abandoned by their crews before the destruction was complete.[2]

Where an enemy warship was scuttled and blown up by her own crew in order to avoid capture by a British squadron, Sir Samuel held that the destruction was brought about by the presence of the squadron and that the claimants were therefore entitled to prize bounty.[3] But where an English warship, the *Canopus* was lying aground and in a disabled condition in the harbor of Port Stanley (Falkland Islands) and which fired upon two enemy cruisers which came within its range and drove them away, and the cruisers were pursued by a British squadron and destroyed along with other German warships in the Battle of Falkland Islands in a portion of the sea well out of sight of land, Sir Samuel held that the *Canopus* did not form part of the squadron and that having been detached for other duties, she did not take part in the chase or engagement and consequently her commander, officers and crew were not actually present at the destruction of the German warships within the meaning of the Naval Prize Act and were not therefore entitled to participate in the bounty.[4]

Likewise where certain destroyers took no part in the action but came up at the moment when the enemy ship was sunk, they were excluded from a share in the prize bounty.[5]

And where the destruction of enemy warships was brought about by joint military and naval action, Sir Samuel held that prize bounty being a purely naval reward no award of bounty could be made. In this case a number of German and Austrian warships had been destroyed by the British and Japanese land and naval forces in the course of the bombardment of Tsingtau, but there was no evidence to show whether the vessels were sunk by the British or Japanese forces. Sir Samuel regarded the latter circumstance as immaterial; even if the destruction had been wrought by the British forces alone, he said, prize bounty was not allowable for the reason that the destruction was not the

[1] The *Espeigle and other vessels*, X Lloyd 364.
[2] *H. M. Submarine Vessel* E 12, X, *ibid.*, 387.
[3] The *Meteor*, VI Lloyd 47; II Br. & Col. Pr. Cas. 313.
[4] The *Falkland Islands Battle*, VI *ibid.*, 71; II *ibid.*, 383.
[5] The *Königin Luise*, VI Lloyd 413.

result of naval action alone.[1] Likewise in the case of the *Sulman Pak and other vessels*[2] Sir Henry Duke held in accordance with Lord Stowell's decision in *La Bellone* (2 Dodson 343; 2 Eng. P. C. 227) that joint captures by military and naval forces were "entirely outside the statute" and that to establish a joint capture requires proof that both forces were in fact participants in the operation of capture. In this case Sir Henry found that the military forces did not in fact take any part in the capture and that in consequence the ships by which the captures were actually made were entitled to prize bounty.

But where two aeroplanes assisted two monitors in the destruction of a German cruiser, the pilots and observers of the aeroplanes, who were attached to the monitors, were allowed a share in the prize bounty awarded.[3] And where a seaplane cooperated with a warship in destroying a submarine, prize bounty was awarded the officers and crews of both.

Naturally there were cases, when enemy vessels were sunk, where it was difficult for the Prize Court to determine the number of persons on board and therefore to calculate the amount of the prize bounty earned[4] but where no accurate figures were available The Court accepted the estimate of the claimants.[5] In the case of the *Battle of Jutland*[6] where eleven German ships were destroyed by the British fleet it being impossible to contend that any one ship or squadron was responsible for the sinking of any particular enemy ship the battle was treated as a "joint or common enterprise" and prize bounty amounting to £22,685 was awarded to the whole fleet. Sir Henry Duke after referring to the admiration and gratitude of the nation added that "the record of these proceedings will be one of the most treasured documents in the archives of this court."

[1] H. M. S. *Triumph and Usk*, VI Lloyd 130; 11 *ibid.*, 424.

[2] III Br. & Col. Pr. Cas. 1007. See also the case of the *Feldmarschall* (*ibid.*, 549), where the Naval Prize Tribunal held that it was not sufficient, in order to establish a right to share in the proceeds of prize on the part of asserted joint captures, that the capture took place in the course of a joint enterprise. In this case it was held that the *Feldmarschall* was captured by the fleet alone, though the military forces were coöperating, and consequently the army had no right to a share in the prize bounty.

[3] The *Königsberg*, VI Lloyd 414.

[4] The *U C 70*, X *ibid.*, 154.

[5] For example the *Carmania*, V Lloyd 30; II Br. & Col. Pr. Cas. 77.

[6] X Lloyd 148; III Br. & Col. Pr. Cas. 892. A curious case was that of the *Den of Glamis* (So. Afr., p. 9), where the Prize Court of South Africa awarded bounty to the officers and crew of a British ship, which was chartered to a German steamship company, for having seized the cargo at the neutral port of Beira upon the desertion of the ship of the German super cargo, and for having navigated it to the port of Durban. It was not a case of capture but of the taking possession of the ship by the British officers and crew already on board and conducting it to a British port.

Sec. 29. Droits of the Crown and Droits of Admiralty. English prize law and practice make a distinction between "prize bounty" and "prize." Prize consists of property lawfully captured and condemned in favor of the Crown in its own right entered as "droits of the Crown" or as "droits of Admiralty"; prize bounty, on the other hand, is a grant made by parliament out of public moneys as a reward for bravery and to encourage success in naval operations.[1] The former ordinarily consists of the proceeds from the sale of prizes condemned; the latter is an allowance made out of the general fund at the disposal of Parliament without reference to its source.

By the Naval Prize Act, 1918, it was provided that if the Crown was pleased by proclamation or Order in Council to signify its intention of making a grant of prize money out of the proceeds of prize captured during the existing war, the sums which had been or might be received in respect of ships and goods captured during the war, specified in part 1 of the schedule, were to be paid into a fund called the "Naval Prize Fund," which fund should be employed for the payment of prize money to the members of His Majesty's naval and marine forces for their benefit and encouragement. The determination of the question whether any sum in a particular case of capture should be paid into or out of this fund was devolved upon a specially constituted board known as the Naval Prize Tribunal.[2] A proclamation declaring the intention of the Crown to make such grants was issued on August 15, 1918. The Act of 1918 directed that there should be paid into the naval prize fund any money in the custody of the Prize Court which it had received in respect of any ship or goods condemned by any Prize Court, whether in the United Kingdom or elsewhere, "being droits of the Crown." [3]

[1] See H. M. S. *Triumph and Usk*, VI Lloyd 130; II Br. & Col. Pr. Cas. at p. 428. All prizes, according to English law and practice, constitute either "droits of the Crown" or "droits of Admiralty." It was the former which under the old practice were generally granted to captors by proclamation issued at the outbreak of war. "Droits of Admiralty" constituted the perquisites of the Lord High Admiral so long as that office was in existence; after its abolition they passed to the Crown. Unlike the "droits of the Crown," no general grant of them was ever made to captors, but it appears to have been the occasional practice of the Crown, out of its bounty, to make grants, in varying proportion, of them as a reward to those who had rendered assistance in making captures. But the two classes of "droits" were kept separate; "droits of Admiralty" were dealt with by the Treasury; while "droits of the Crown" were dealt with by the Admiralty.

[2] As to this Tribunal see Sec. 12, *supra*.

[3] The Act of 1918 also provided that the officers and crews of airships placed under the admiralty whom the Prize Court should hold to have been actually present and to have actually participated in the capture or destruction of an armed enemy ship should be entitled to share in the bounty al-

Droits of the admiralty, on the other hand, were not to be paid into the prize fund.[1]

Sec. 30. Decisions of the Naval Prize Tribunal. In numerous cases the naval prize tribunal was called upon to decide whether the proceeds from particular captures were "droits of the Crown" and therefore payable into the prize fund, or whether they were "droits of admiralty" and not so payable. With a view to establishing certain general principles which could be applied in the decision of the various cases which arose, four typical cases were submitted to the tribunal in December, 1918, and opinions were duly rendered in each of them.[2]

As regards certain cases, such as those involving the capture of enemy ships and cargoes on the high seas or in enemy ports, there was no dispute, the proceeds of such prizes being admitted to be "droits of the Crown" and therefore payable into the naval prize fund; on the other hand, the proceeds of ships and cargoes seized in British ports were admittedly "droits of admiralty" and therefore belonged to the Exchequer. The chief difficulty arose over the proceeds from the sale of contraband goods, and this because of the new methods of dealing with such goods. During the late war owing to the difficulty of examination at sea the practice was adopted of diverting neutral merchant vessels suspected of carrying contraband, to convenient British ports where the goods were seized by the customs authorities, so that the seizures were no longer, as formerly, made by naval officers at sea.[3] Were the proceeds of prizes taken in this way to be regarded as "droits of the Crown" or "droits of admiralty"?

Lord Phillimore speaking for the naval prize tribunal quoted at the outset from the decision of Lord Stowell in the *Maria Francoise*[4] to the effect that "all rights of prize belong originally to the Crown, and the beneficial interest derived to others can

lowed. This provision of the Act was applied in the case of the *Breslau*, a German cruiser which was pursued into a mine field by the air forces forming a part of a squadron blockading the Dardanelles (VIII Lloyd 446).

[1] In all of the wars of importance in which Great Britain was a belligerent, for more than two centuries, except the war with Turkey in 1807, it had been the practice by Statute, proclamation or Order in Council to grant to ships belonging to the British navy all prizes taken by them, except those which the Crown had already granted to the Lord High Admiral and subject also to the qualification that the Crown always had the right to release a prize before adjudication and could not be required to proceed to adjudication. The *Derflinger and Other Vessels*, III Br. & Col. Pr. Cas. at p. 505. But, as stated above (Sec. 28), by an Order in Council of August 28, 1914, the old practice was abolished and it was provided that the net proceeds of all seizures and captures should be paid into the consolidated fund.

[2] The *Abonema and Other Ships*, VIII Lloyd 284; III Br. & Col. Pr. Cas. 302.

[3] See Sec. 443 *infra*.

[4] 6 Rob. at p. 203.

proceed only from the grant of the Crown." Lord Phillimore then added:

"But from ancient times a certain portion of those rights were assigned to maintain the dignity of the Lord High Admiral; hence arose the distinction between droits of the Crown and droits of admiralty. At the outbreak of war it was the practice of the Crown to grant its interest in any prize taken to the captors thereof—that is, to the officers and men of the ship which effected the capture. This left a few cases, which will be referred to hereafter, of droits of the Crown which had not been granted away; but, putting these aside, the practical distinction was between captures which enured for the benefit of the officers and men of individual ships of His Majesty's Navy or commissioned privateers, on the one hand, and droits of admiralty on the other.

"When the office of Lord High Admiral ceased to be filled, and the Crown in lieu thereof appointed Lords Commissioners of the Admiralty, droits of admiralty reverted to the Crown, and upon the surrender of the hereditary revenues of the Crown which it has been the practice for recent Monarchs to make upon their accession, and which surrender by his present Majesty is embodied in the Civil List Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 28), passed to the Exchequer. Hence arose the somewhat paradoxical position that droits of the Crown went to the Navy, and droits of admiralty to the Exchequer. Before this war the practice was, as already stated, that each captured prize enured, subject to any rights of the flag officer, for the benefit of the officers and men of the capturing ship or ships; but at the beginning of this war the Crown did not make the usual grant. The Naval Prize Act and the Proclamation thereunder have constituted the droits of the Crown one fund 'for the entire benefit and encouragement of the officers and men of our naval and marine forces.'"[1]

Then taking up in turn the four cases submitted to the tribunal, Lord Phillimore laid down the following rules which were to serve as guiding principles in the decisions of future cases:

First, the proceeds of condemned goods brought into British ports in the ordinary course of a voyage without any pressure, direct or indirect, on the part of British ships, that is, without the "hand of violence," to use the language of Lord Stowell, being laid upon them, and which were seized by the customs authorities, were to be treated as they had always been, as "droits of admiralty," and were not therefore payable into the naval prize fund. The same was true of condemned goods brought in by vessels which had diverted voluntarily to British ports and of vessels which called at British ports for bunker coal.

[1] The whole subject of prize droits is luminously discussed in its historical aspects in Rothery's *Prize Droits, Being a Report to H. M. Treasury on Droits of the Crown and of Admiralty in Time of War*, revised and annotated by E. S. Roscoe (London, 1915). See also an article by Thos. Baty entitled *Prize Droits*, 32 *Law Quarterly Review* (1916), pp. 38 ff.

Second, the proceeds of condemned cargoes carried on neutral vessels which were intercepted at sea by British ships and sent to British ports in charge of an armed guard were to be treated as "droits of the Crown" and therefore to be paid into the naval prize fund, this because the "hand of violence" had been exercised upon the vessels.[1] The same was true of the proceeds of condemned goods on neutral vessels which called at British ports and voluntarily submitted to examination under arrangements between their owners and the British government, for the purpose of avoiding seizure at sea. The naval prize tribunal admitted that this latter was the most difficult case that it had to decide, for the reason that in a sense such vessels entered port voluntarily and not "upon revolt from the enemy." Yet since it was the fear of the British navy and of capture at sea which led the owners to direct the master to enter a British port, it could be said that such cases were "in good sense" instances of forcible entry; in short, the "hand of violence" had been laid upon them.

Third, there was no distinction in principle between the case of goods seized upon a ship which came into a British port and the case of goods allowed to be carried on to the ship's destination under an arrangement with the government by which the shipowners undertook to return the goods or their proceeds to England for prize proceedings. Whether the proceeds of goods so returned belonged to the naval prize fund depended on whether if they had been taken out of the ship when it was first seized they would have been regarded as "droits of the Crown" or "droits of admiralty."

Fourth, that the proceeds of an enemy vessel captured at sea by a British warship and sent into a British port in charge of a prize crew must be regarded as "droits of the Crown," but that the proceeds of an enemy vessel seized outside a British port by the collector of customs being a seizure by a non-commissioned captor must be treated as "droits of admiralty."

Fifth, that the British share of the proceeds of enemy vessels seized by a joint force of French and British ships and condemned by the French Prize Council constituted a "droit of the Crown."

[1] Compare also the judgment of the Privy Council in the case of the *Roumanian* (I Br. & Col. Pr. Cas. at p. 540), where it was laid down that the seizure of enemy goods in a British port by the customs authorities was a lawful capture and fell within the jurisdiction of the Prize Court.

Sec. 31. The Same (Continued). In a later group of cases[1] the naval prize tribunal held that where certain enemy vessels which were in Egyptian ports at the outbreak of the war, or entered them shortly thereafter, and which declined to leave and were forcibly taken out to sea by the Egyptian authorities and formally captured by British ships of war, the proceeds must be treated as "droits of the Crown" and not as "droits of the admiralty." The argument of the Exchequer that the tribunal should go behind the formal captures at sea, take into consideration the anterior circumstances and hold that, in truth, the seizures had been made in port and consequently the proceeds were "droits of admiralty" was rejected, the tribunal declaring that it could not inquire "too minutely" into the political considerations which, owing to the peculiar position of Egypt and the Suez Canal convention, induced the government to adopt the procedure of taking the vessels out to sea, of formally capturing them there and of bringing them back to the ports from which they had been removed.

In the same group of cases it was held that the proceeds of condemned cargoes on vessels which, while passing through the Straits of Dover, were compelled by reason of the British system of patrols to go into the Downs for examination, were "droits of the Crown," this on the basis of the decision in the earlier group of cases that it was the fear of the British navy which impelled them to enter the Downs for examination and it could be said therefore that the "hand of violence" had been exercised. An important ruling in this group of cases was that where a ship condemned as prize and was subsequently released by the Crown as an act of grace, because it turned out that the ship was a neutral vessel, the prize must according to the clear intention of the Naval Prize Act of 1918 be treated as a "droit of the Crown"; that it was immaterial that the release took place before the passing of the said Act and that in the circumstances a sum equal to the value of the vessel with interest at 5 per cent should be paid by the Exchequer into the naval prize fund. The principle involved in this case was the extent to which the Crown could interfere with the rights of captors by releasing their prizes or by discontinuing proceedings against them. The rights of the Crown to release a prize before adjudication or to refuse to proceed to adjudication, their Lordships said, had always been rec-

[1] The *Derflinger and Other Vessels*, VIII Lloyd 458; III Br. & Col. Pr. Cas. 497.

ognized; but after adjudication, the captor's right to the prize, if condemned, was considered to be vested and indefeasible. Upon grounds of the highest policy it was most important that this right of the Crown should not be interfered with, and the naval prize tribunal was of the opinion that the Act of 1918 under which it sat had in fact preserved the right. Nevertheless, as to the passing of the property to the captors after adjudication there was reason to believe that it required a formal sentence or decree to give the captors an indefeasible title as shown by the case of the *Elsebe* (or *Elsabe*) [1] where a vessel had been "condemned" by Lord Stowell, who afterwards upheld the right of the Crown to release it. Their Lordships therefore thought there was sufficient authority for holding that the Crown might release a prize even after it had been condemned.

Another point decided in the same group of cases was that where an arrangement had been entered into between the Crown and certain American meat packers who had shipped large quantities of foodstuffs ostensibly to neutral consignees in Scandinavia and which had been formally condemned as contraband, under which arrangement a certain percentage of the proceeds of the sale should be paid to the packers, there was no obligation on the part of the Exchequer to bring the value of the released percentage into court for adjudication by the tribunal.

In the case of the *Feldmarschall*,[2] decided in 1920, the naval prize tribunal held that a prize which was the result of joint capture by sea and land forces was not a reserved "droit of the Crown" but that the share of the proceeds which might be appropriated to the navy must be regarded as a "droit of the Crown" and therefore payable into the naval prize fund, while the share appropriated to the army must be treated as a "droit of admiralty" and be paid into the Exchequer.

The proceeds of craft captured on the beach or on an inland lake by the military forces were held to be "droits of admiralty" and not therefore payable into the naval prize fund.[3]

[1] 6 C. Rob. 173; 1 Eng. P. C. 441.
[2] IX Lloyd 302; III Br. & Col. Pr. Cas. 548.
[3] The *Anichab and other Craft*, 10 Lloyd 302.
As to costs, charges and claims upon the Naval Prize Fund see the *Bernisse & Elve* (X Lloyd 279), the *Oregon and Other Vessels* (*ibid.*, 289), the *Canadia* (*ibid.*, 422), the *Adolf and Other Vessels* (*ibid.*, 54).

CHAPTER II

JURISDICTION OF PRIZE COURTS

I

Sources

Sec. 32. Jurisdiction Determined by Both International and Municipal Law. The general jurisdiction of a Prize Court results from the established principle of international law that the legality of maritime captures must be judicially determined and that mere seizure by a belligerent does not give title until the property seized has been brought into a Prize Court and condemned as a good and lawful prize.[1] However, the full extent and the precise limits of this jurisdiction are matters which are fixed by the national law of each belligerent state. Thus the German supreme Prize Court in the case of the *Eemland and Gaasterland*[2] said: "the material competence of Prize Courts is not fixed by the norms of international law, but by national law. The extent of this competence is therefore regulated according to a different manner in each country."

Sec. 33. National Regulations. In most countries it is determined in part by legislative act and in part by prize regulations promulgated by the proper executive authorities. Thus in Germany it is provided by the law of May 3, 1884,[3] that the legality of captures in [maritime] war shall be determined by specially constituted tribunals (*prisengerichte*), but the extent and limits of their jurisdiction are determined in detail by the Prize Courts Ordinance (*Prisengerichtsordnung*) of April 15, 1911, promulgated August 3, 1914,[4] in pursuance of section 2 of the law of 1884. By the terms of this ordinance the jurisdiction of the Prize Court includes the determination of the question as to whether the property seized is an object of lawful prize, whether it has been captured or merely arrested and detained

[1] See the cases cited, *supra*, Sec. 1.
[2] I *Entsch.* 388; Fauchille et De Visscher, *Jurispr. All.* 296.
[3] *Reichsgesetzblatt*, 1884, p. 49. [4] *Ibid.*, 1914, p. 301.

without intention of capture, whether it should be condemned or released, whether in case the property is not condemnable there were justifiable grounds for seizing it, whether in case the prize has been destroyed at sea there were justifiable grounds for the destruction, whether the owners are entitled to an indemnity for damages and losses sustained, etc.[1] The jurisdiction of the Belgian Prize Council, on the contrary, is regulated not by executive ordinance, but by the organic law of 1919 for the constitution of the Prize Council, which in more general terms empowers the Council to decide upon the validity of prizes taken by captors of Belgian nationality or by allied captors, with the consent of their State, and upon "all other matters of prize" when the capture has been made in the territorial waters of Belgium or its colonies or when the interest in litigation was covered by the Belgian flag.

In China the jurisdiction of the Prize Court is declared by the "Prize Court Rules" of November 30, 1917,[2] to extend to "all matters relating to capture at sea."

In France the matter is dealt with in equally general terms by the decree of November 28, 1861, Article 1 of which charges the Prize Council with deciding upon "all claims and issues (*demandes et contestations*) relative to the validity of maritime prizes the judgment of which belongs to the French authorities.[3]

Sec. 34. Sources of British Prize Jurisdiction. The jurisdiction of the British Prize Courts, apart from that resulting from the general principles of international prize law, is determined in part by acts of parliament, in part by the terms of the royal commissions under which the Prize Courts are constituted at the beginning of war, in part by Orders in Council issued from time to time during the war and in part through the interpretation of the Prize Courts themselves. In the case of the *Südmark* (No. 2)[4] the Judicial Committee rejecting the argument of

[1] See the somewhat similar prescriptions in the Austro-Hungarian *Prisengerichtsordnung* of Nov. 28, 1914, Secs. 7-8.

[2] Text in *Judgments of the High Prize Court of the Republic of China*, p. 125. When China entered the war (August 14, 1917), she had no Prize Court rules and it was contended by the claimants of several German ships seized at the outbreak of the war that the rules in so far as they related to capture could not be applied retroactively, but both the District and Supreme Prize Court rejected the argument. See, among others, the case of the *Albenga*, *ibid.*, p. 34.

[3] The reprisals decree of March 13, 1915, extended the jurisdiction of the Prize Council to include the determination of the question of whether goods belonging to German subjects seized in pursuance of the decree were coming or going from Germany.

[4] VI Lloyd 343; II Br. & Col. Pr. Cas. at p. 478. As to the origin and

counsel that the Prize Court had jurisdiction, and, in fact was under an obligation to enforce the rules of the Hague Convention, said:

"The jurisdiction of a Court of Prize does not embrace the whole region covered by international law. It is confined to taking cognizance of, and adjudicating upon, certain matters (including capture at sea), which in former times were enumerated in the royal commissions under which the Court was constituted, and are now defined both by statute and by the royal commission issued at the beginning of the war—see Naval Prize Act, 1864 (3) (27 & 28 Vict. c. 25), s. 55, sub-s. 5, Judicature Act, 1891 (54 & 55 Vict. c. 53), s. 4, sub-s. 1, and Royal Commission of August 6, 1914."[1]

In the case of the *Roumanian*[2] Sir Samuel Evans referring to the royal commission issued to the Prize Court at the beginning of the late war as the source of its jurisdiction, said:

"By this commission the Court is 'authorized and required to take cognizance of and judicially to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels and goods that are or shall be taken, and to hear and determine the same; and according to the course of admiralty and the law of nations, and the statutes, rules and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels and goods as shall belong to the German Empire or the citizens or subjects thereof, or to any other persons inhabiting within any of the countries, territories or dominions of the said German Empire, which shall be brought before you for trial and condemnation.'"

The jurisdiction thus conferred was broadly interpreted by the Prize Courts, so that in practice it was made to embrace nearly all claims and controversies arising in connection with maritime capture—a goodly number in fact over which the prize tribunals of various other countries declared themselves to be without jurisdiction.

Sec. 35. The Same. Italy and Siam. The jurisdiction of the Italian Prize Commission is declared by article 225 of the Merchant Marine Code to be the determination of the validity of the capture and the liability to confiscation of prizes taken. By the decree of May 30, 1915, relative to the treatment of enemy merchant vessels sequestered in Italian ports at the out-

jurisdiction of the British Prize Court see 140 *Law Times* (1915-1916), 417 ff. and 437 ff.

[1] The Naval Prize Act, 1864, expressly reserves the jurisdiction and authority of the Prize Court "to take cognizance of and judicially proceed upon any capture, seizure, prize or reprisal of any ship or goods, and to hear and determine the same, according to the course of Admiralty and the law of nations, to adjudge and condemn any ship or goods" and also "any other jurisdiction or authority of, or exercisable by a Prize Court."

[2] I Lloyd 191; I Br. & Col. Pr. Cas. at p. 85.

break of the late war the Prize Commission was further charged with determining the nationality of the goods found on such vessels, which goods if of enemy nationality, were to be restored at the close of the war without payment or could be requisitioned upon payment, and if of neutral nationality, were to be released or requisitioned upon payment.[1] By the decree of August 1, 1915,[2] the Prize Commission was further charged with hearing and determining claims for damages arising in connection with the exercise of the right of capture.

The jurisdiction of the Prize Court of Siam as defined by a decree of July 20, 1917, embraced "full jurisdiction . . . to take cognizance and judicially proceed in all matters of prize, including special captures, namely, conjoint captures with an ally, captures arising out of land expeditions, joint captures or captures by the officers and crew of a ship other than a ship of war and also salvage and prize bounty."

Sec. 36. Prize Court Judge of Its Own Competence. The jurisdiction of a Prize Court to determine the legality of a capture and pass upon questions accessory thereto includes the jurisdiction to determine its own competence according to the national law, that is, whether a particular claim presented to the Court is one which it is competent to hear and decide. Naturally this includes the right to reject the claim. Thus the German supreme Prize Court said in the case of *Eemland and Gaasterland* (sec. 32 *supra*):

"According to the organization of prize procedure, such as it has been established by the Prize Court Ordinance, the indispensable base to the preliminary condition of the institution of the proceedings is to deliver the prize to the prize officer. If the purpose of the capture was not to take the prize in to port, it is necessary that a report of the capture or, in default of a report to the Court, then to the admiralty. Communications or declarations of privately interested parties do not suffice for the institution of proceedings. . . . This does not mean, it is well understood, that the institution of prize proceedings is left to the good pleasure of the maritime authorities. These latter have, on the contrary, the obligation to bring before a Prize Court for decision every matter of prize which has not been determined in some other manner. This is in fact what has been done without exception during the present war. In a great number of instances the Prize Courts have been seized of cases which they declined to take jurisdiction."[3]

[1] Text in Fauchille et Basdevant, *Jurispr. Ital.*, Annexe, p. VII.
[2] Text, *ibid.*, p. xxii. Certain special powers were conferred on the Prize Commission by the decree of June 24, 1915. *Ibid.*, p. xiii.
[3] See also the Austro-Hungarian case of the *Schkodra No. 1. Normal Verordnungsblatt für die K. u. K. Kriegsmarine*, June 25, 1918, 21 Stück, p. 216.

Judge Cator of the Prize Court for Egypt in the case of *Ten Bales of Silk at Port Said*[1] thus defined the general jurisdiction of the British Prize Court:

"The law and customs which regulate the condemnation or release of such property is termed prize law, and the question whether any particular goods fall within the category of prize is determinable by the Prize Court; that is to say, if the Crown advances a claim to goods as maritime prize, it is for the Prize Court alone to determine all questions to which the claim gives birth, whether such questions relate to ownership arising out of capture of goods admittedly subject to prize law, or go to the jurisdiction of the court by a defence that the goods have not such a quality as to render them susceptible of what I may call maritime capture. . . . It is not often that a question arises as to the quality in which goods are taken, for they are usually seized on board a ship; and it is fundamental that all goods captured afloat are subject to prize law. Still, it does sometimes happen that a cargo has been separated from a ship, and a dispute has ensued between the captors and owner as to whether it falls within the jurisdiction of the prize court or not."

The Italian Prize Commission in the cases of the *Mikail*[2] and the *Anthippi*[3] replying to the argument of the owners that the Commission was without jurisdiction for reasons to be explained hereafter, said:

"It belongs to the judge to examine the matter submitted to his judgment when the decision comprises as in the present case the interpretation of an act relied upon as the basis of the claim. Thus, even if this commission does not have the power to pronounce upon its own competence, it is impossible to deny that it has in the special case the right to pronounce on the two preliminary exceptions, since it would lead, if it were well-founded, not to a denial of the competence of this commission, but simply the admissibility of the action of the State."

II

Equitable Jurisdiction of Prize Courts

Sec. 37. British Jurisprudence. Sir Samuel Evans said in the case of the *Juno*[4] that "the Prize Court has always claimed

[1] II Br. & Col. Pr. Cas. at p. 251.
[2] Fauchille et Basdevant, *Jurispr. Ital.*, 216.
[3] *Ibid.*, 207.
[4] I Lloyd 177; I Br. & Col. Pr. Cas. at p. 160. See also the case of the *Iolo* (I Br. & Col. Pr. Cas. at p. 301), where Sir Samuel Evans quoted the following from Lord Stowell:
"This Court sits no more than the Courts of common law do to make contracts between parties; but, as a Court exercising an equitable juris-

to exercise equitable jurisdiction, using that term in its broadest sense, and not in its more technical chancery meaning," and in this case he held that the claim of certain shipowners to freight and other expenses could be resolved by "a rational application of fair and equitable considerations." Accordingly he allowed in part their claim.

Again in the case of the *Corsican Prince*[1] adverting to the distinction between the jurisdiction of equity and law applied by the Prize Courts and those of the courts of common law, he said: "The Prize Courts deal with claims in accordance with the law of nations and upon equitable principles freed from contracts, which almost always clash and have effect upon capture or seizure, by reason of the non-approval or non-completion of the contract of affreightment; whereas common law courts would only determine the consequences of the strictly legal contractual obligations of the parties." A common law court would therefore allow a claimant the whole freight earned or nothing at all, according to whether the contract had been performed or not, whereas the Prize Court could take all the circumstances into consideration and allow proportional freight or discard the contract rate altogether.[2]

Sec. 38. But Prize Court No Jurisdiction to Redress Hardship. Where a Prize Court is called upon to decide the question of the legality of a capture, which legality is determined by positive rules of municipal or international law, considerations of equity cannot be allowed to influence the decision of the Prize Court. Its decisions in such questions must therefore be based upon strict legal principles. If the decision results in hardship or substantial injustice to the claimant, the government and not the Prize Court has the power to furnish redress. Thus the British Prize Court dismissed the claims of British and neutral mortgagees of enemy ships and goods although the mortgages were executed in time of peace, and upon equitable considerations the mortgagees were entitled to reimbursement out of the proceeds of the sale of the prize for the amount of their

diction, it considers itself bound to prove as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction."

In this case and that of the *St. Helena* (*ibid.*, 622) Sir Samuel Evans pointed out that the principles of prize law were more equitable than those of the common law and that consequently a claimant can sometimes obtain relief in the Prize Court when he could not in a common law court.

[1] II Lloyd 198; I Br. & Col. Pr. Cas. at p. 185.

[2] See further as to this Sec. 479 *infra*.

advances. Sir Samuel Evans held, however, that the Prize Court had no jurisdiction to allow such claims although he suggested that the Crown might "out of its bounty deal favorably with any such claims." [1] Again he refused to entertain the claims of certain British pledgees of bills of lading of captured enemy cargo, who contended that while they were not the legal owners they had a beneficial interest in the goods and therefore an equitable right to reimbursement from the proceeds of the sale. "Such proceedings," he said, "would be wholly foreign to the jurisdiction and working of this court." [2] Upon appeal Sir Samuel's judgment was affirmed by the Judicial Committee. Their Lordships declared that the redress of hardships, such as these, rested with the Crown and not with the Prize Court and they added that the power of the Crown to exercise bounty in such cases still existed and was not affected by the Civil List Acts. Lord Mersey said on this point: [3]

"It is said that in Lord Stowell's time there was a possibility of redressing any individual hardship which might be caused to neutral or subject by

[1] The *Marie Glaeser*, I Lloyd 56; I Br. & Col. Pr. Cas. at p. 59. See also the *Henry Fürst*, I Lloyd 183. Further discussion as to the claims of mortgagees, Secs. 116-117; 203-244; 331-335 *infra*. The editor of the *London Solicitors Journal and Weekly Reporter* (Vol. 59, p. 156), criticized as technical and archaic this doctrine of the Prize Court that being a court of law it must follow strict legal principles. "Is a British or neutral subject," the editor asked, "to lose his money because he has had business relations with persons who at the time were subjects of a friendly state, but who have since become enemies? The answer is clearly in the negative." Among other reasons given by the Prize Court for its decision was that it did not possess the means for making the necessary inquiries and calculations for ascertaining the extent of the claims of mortgagees in such cases. But as the editor of the *Solicitors' Journal* pointed out, the Court in other cases is both a court of law and a court of equity and that in fact it can and has made such calculations, as it did in the *Juno* in respect to freight earned. "But here," he continued, "we have the doctrine that the Prize Court is a court of equity—apparently a court of equity for some purposes and of law for other purposes. . . . To allow freight, it is a court of equity with means of making calculations; but when a mortgagee puts in a claim, the Court is a court of law and says it cannot make the necessary calculations." He concluded, "This is an extraordinary state of affairs, and while admitting the weight of authority the president has had to contend with, and recognizing to the full the responsibility of this position, and the anxious carefulness of his judgments, we regret that the British Prize Court has not led the way in ameliorating the case law and admitting claims which obviously require satisfaction. The hundred years since Lord Stowell might have sufficed for this change." Compare also the remarks of Roscoe, *Lord Stowell; His Life and the Development of English Prize Law* (p. 84), who observes that while the decisions of Sir Samuel Evans during the late war in respect to the rights of lien holders and mortgagees, based as they were upon Stowell's judgment, were a remarkable tribute to him, "one does not feel sure that, under the altered circumstances of the age, he might not have found some ground by which to limit the effect of his previous judgments." See further as to this, Sec. 295 *infra*.

[2] The *Odessa*, the *Cape Corso*, I, *ibid.*, 301; I, *ibid.*, at p. 176.

[3] II, *ibid.*, 405; I, *ibid.*, at p. 567. See also the *Tergestea* (II Lloyd 149).

an appeal to the bounty of the Crown, and that in some way or other the Crown has lost its power of bounty in the matter. It is true that Lord Stowell, when pressed with the individual hardship of decisions he was about to announce, sometimes referred to the fact that any apparent injustice might be met by an exercise of the Crown's bounty—see *The Belvidere* (1 Dods. 353) and *The Constantia Harlessen* (Edw. 232). Whether his judgments were in any way based on that consideration, or whether they would not have been the same if the possibility of the exercise of the Crown's bounty had not existed, is an arguable point. In their Lordships' opinion, however, it is unnecessary to decide this point, for, after hearing the Attorney-General, they have come to the conclusion not only that the Crown had and was accustomed to exercise a power of bounty by way of redress of hardships, but that such power still exists unimpaired."

Sec. 39. The Same (Continued). In the case of the *Emil*[1] the Prize Court for Egypt reached the same conclusion regarding the want of jurisdiction to allow the claims of British mortgagees of captured enemy property or to exercise the bounty of the Crown to redress hardships. On the latter point Judge Cator said:

"It has been suggested that this Court might exercise what is called the bounty of the Crown in favour of these British mortgagees, but that is impossible. The Crown has always listened favourably to the complaints of British subjects who suffer hardship by reason of the strict enforcement of the rule, and it would seem that Lord Stowell sometimes himself exercised the Crown's bounty as judge of the Prize Court, and ascertained the sum to be paid by enquiry in chambers—*The Belvidere* (1813), (1 Dods. 183; 2 Eng. P. C. 183). But this practice has not been continued, and I think it must be admitted that if such jurisdiction ever existed it has fallen into desuetude and cannot be revived without legislative authority."[2]

Judge Cator took occasion to say that the Crown, recognizing the justice of such claims which the Prize Court was unable to allow, had recently set up a Prize Claims Committee to consider claims of this character and to recommend to the Crown the exercise of its bounty where the claims were well founded. It may be remarked that although Judge Cator denied that the Prize Court had jurisdiction to allow such claims he thought that "upon general principles of equity" the mortgagee in such cases had in the absence of appearance by the mortgagor a sufficient interest in the subject matter to justify his being heard upon the question, for example, whether the ship should be detained or confiscated and that in case it were condemned he was entitled to appeal against the decree of condemnation.

[1] I Br. & Col. Pr. Cas. 257. See also Sec. 295 *infra*.
[2] To the same effect see the *Hamm and Apolda*, No. 4, South Afr. Prize Court decisions, p. 51; the *Rufidji* (*ibid.*, 77); and the *Bendu*, No. 10 (*ibid.*, 99).

In the case of the *Paneriellos*[1] the Judicial Committee applying the rigorous rules relative to trading with the enemy felt obliged to uphold the condemnation of goods belonging to an alleged subject who was guilty of no conduct which appeared to him to be illegal and whose claim was supported by equitable considerations. As to this their Lordships observed: "These, however, are considerations which, though weighty, can only be addressed to the clemency of the Crown. They cannot affect the judgment which a Prize Court, administering strictly the universal rule as it finds it, is bound to pronounce in the grave case of trading with the enemy."

Sec. 40. Belgian Jurisprudence. The Belgian Prize Council adopted substantially the same view in regard to the incompetence of a Prize Court to extend the doctrine of equity so as to redress hardships. Thus in the case of the *Brussels*,[2] an English vessel, whose master, Captain Fryatt, had been shot by the Germans, which vessel had been recaptured by the Belgian naval forces, the Prize Council observed that in every case of capture there was a "governmental phase" where the captor state might show generosity toward a neutral or allied power, and a "contentious phase" such as existed in the present case where the prize tribunal had merely to decide whether the capture was legal according to the rules of international law, and "however great the regret felt by the Belgian Prize Council at being obliged to detain an allied ship which had become "illustrious" in the struggle against a common enemy, it could not in the present case depart from its mission and decide according to other principles than those of law, tempered according to the case, by equity." The vessel, although originally belonging to the subject of an ally, was therefore condemned.

It followed the same rule in the case of the *Roelfina*[3] and dismissed the claim of an allied government (France) which was an insurer of property captured by the Belgian forces. It said: "However much regret the Belgian Prize Council must feel in being obliged to reject the claim of a friendly nation . . . which during the war has made the most noble effort for the triumph of the cause of civilization, while leaving to the Belgian government the care of giving effect to its claim, it (the Prize Council) is duty bound, upon pain of failing in its mission, to limit itself, to judging according to the law."

[1] IV Lloyd 306; II Br. & Col. Pr. Cas. at p. 57.
[2] 47 *Rev. de Droit Int. et de Lég. Comp.* (1920), p. 135.
[3] *Moniteur Belge*, 1920, p. 136.

Sec. 41. Jurisprudence of Other Countries. The supreme Prize Court of Roumania adopted the same view in the case of the *Nicolae*,[1] a ship requisitioned against the will of the owner by the Russian Soviet authorities and recaptured by the Roumanian authorities.

It is said that the French Prize Council "tempers by considerations of equity." the *règlements* of the eighteenth century,[2] but like the British Prize Court it too declared itself without jurisdiction to pass upon the claims of non-enemy persons who had made advances upon captured enemy cargoes (*les créanciers gagistes*).[3] The Chinese Prize Court likewise held that it had no jurisdiction to pass upon the claims of a neutral firm that had furnished supplies to a captured enemy ship. The jurisdiction of a Prize Court, it declared, was limited solely to determining whether the ship or cargo should be condemned and that the claims of third parties against the ship for debts was a matter for the civil courts to judge.[4]

In the German case of the *Kiew*[5] where the claimants attempted to demonstrate that it was in conformity with equity that the goods in question should be released to them, the Prize Court rejected their contention on the ground that it represented "a false point of view." "A Prize Court," it added, "has no jurisdiction to decide upon the ultimate fate of goods after they have been regularly captured. The sole question, the only one which is decisive in the present case, is whether the ship and goods were liable to capture in virtue of the law of prize in force. If this question is affirmatively answered, the legal conclusion follows with certainty that they are subject to confiscation. Reasons drawn from equity or expediency cannot change anything in the course of judicial procedure. In fact, moreover, no reasons of equity or political expediency could be found which would

[1] Cited by Verzijl, *op. cit.*, p. 32.

[2] De Boeck, *De la Propriété Privée Ennemie*, p. 374. This author quotes Portalis as saying in the celebrated case of the *Statira* that "en général les règlements de la course, qui ne partent qu' improprement le nom de lois, et qui sont eux-mêmes essentialement variables, pro temporibus et causis, sont toujours susceptibles dans leur application d'être tempérés par des vues de sagesse et d'équité," and that "les lois et les règles particulières doivent toujours être exécutées de la manière la plus conforme aux principes de la raison universelle, surtout dans les matières appartenant au droit des gens, dans lesquelles les législateurs se sont toujours glorifiés de n'être que les respectueux interprètes de la loi naturelle."

[3] The *Athena and Other Vessels*, Fauchille, *Jurispr. Franc.* 457; also the *Eir* (*ibid.*, 33).

[4] The *Albenga*, *Judgments of the High Prize Court of the Republic of China*, pp. 16, 20, 25.

[5] I *Entsch.* 241; Fauchille et De Visscher, *Jurispr. All.* 184.

lead to a denial in a case such as this of the right of capture of the ship or the seizure of the goods."

In the case of the *Haelen*[1] the German Prize Court refused to allow a claim of the Belgian Relief Commission for the release of certain goods which were a part of an enemy cargo on an enemy ship which had forfeited the protection accorded to it for the transportation of supplies to the civil population of Belgium. The claim was held to be one over which the Prize Court had no jurisdiction, that belonging rather to the administrative authorities.

III

Relation of Prize Court to Other Courts

Sec. 42. Prize Court Ousts Jurisdiction of Other Courts in Matters of Prize. The principle that a Prize Court has exclusive jurisdiction in matters of prize and that its jurisdiction overrides that of the other courts was emphasized by the Prize Court for Egypt in the case of the *Lützow* (*No.* 6).[2] In this case goods belonging to a Japanese firm had been seized and released to the claimants, whereupon the latter brought an action for damages against a bonded warehouse company in whose custody they had been placed as bailees or agents for the marshal. The defendants denied that the Prize Court had jurisdiction and maintained that the mixed tribunals alone were competent to hear the case. The Prize Court overruled the objection and held that the action being one "concerning merchandise captured in the ports of Egypt" the Prize Court alone had jurisdiction to hear and determine it."[3] Adverting to the work of the Egyptian Prize Court and the validity of its establishment, Judge Grain said:

"H. B. M. Prize Court has been established at Alexandria and sitting almost daily for nearly four years, and somewhere about 1,200 cases have been heard before the Court and adjudicated upon, and I think I may say without exaggeration that members of practically every nation in the world

[1] II *Entsch.* 177.
[2] III Br. & Col. Pr. Cas. 329.
[3] But compare the case of the *Sturmvogel* and see *Adler* (So. Afr. cases 29), where a civil court issued an attachment against an enemy ship and gave judgment to lien holders for a sum due for coal, provisions and money advanced for dock dues, etc. The claimants then applied to the Prize Court to order the payment of the judgment out of the proceeds of the sale of the prize.

have appeared and pleaded before the court, and accepted its jurisdiction, submitted to and acknowledged its judgments, in some cases following the jurisdiction and carrying their appeals to the Privy Council in London. The validity of the establishment of this court has never been contested by the authorities in Egypt, nor have they even suggested that it had no right to be established. They have gone farther and approved of its establishment by decreeing that prize "shall be handed over for judgment before the British prize court" by the Decree of August 5, 1914, which is binding on both the native courts and mixed tribunals (*Règlement d'Organization Judiciare,* article 2).

"Therefore, to sum up the various points of law, questions of fact, and the status of the judicial systems in Egypt, I have come to the conclusion that the Prize Court ousts the jurisdiction of the municipal courts in all questions of prize, the Prize Court jurisdiction being exclusive; that the mixed tribunals are, together with the native courts, the municipal courts of Egypt; that the Prize Court can follow prize goods through all incidents or torts concerning them, and its jurisdiction continues so long as anything remains to be done touching the subject-matter; and, further, that H.B.M. Prize Court is rightly established in Egypt, and established with the consent and approval of the authorities of State in Egypt."

Upon appeal [1] the Judicial Committee approved the holding of Judge Grain that the Prize Court has jurisdiction over incidental matters which depend for their decisions on questions of prize or no prize but disapproved his judgment against the warehouse company on the ground that the Prize Court had no jurisdiction to decide as between parties, some of whom had not been parties to the prize proceedings, disputes which do not involve the consideration of the *jus belli* and arising out of facts which occurred after the release of the property to the claimant. Referring to the authorities on the jurisdiction of the Prize Court, upon which Judge Grain replied, Sir Arthur Channell, speaking for the Judicial Committee, said:

"What they show is that the Prize Court has exclusive jurisdiction over the question of prize or no prize, and also over all questions which depend for their proper determination on the question of prize or no prize, the reason being that prizes are acquisitions *jure belli,* and that *jus belli* is to be determined by the law of nations, and not by the municipal law of any country. . . . This doctrine as to prize jurisdiction over what are called incidental matters, meaning matters which depend for their decision on prize or no prize, is well established; but it obviously has no application to the present case, where the claim for indemnity in no way required the consideration of any question of prize law or international law for its determination. The Prize Court also has the incidental jurisdiction which is necessary to enable it to keep control over the captured ship or goods, pending the decision as to whether or not they are lawful prize, in order

[1] *The Egyptian Bonded Ware Co.* v. *Yeyasu Goshi Kaisha,* etc., III, *ibid.,* 1023 and X Lloyd 394.

that the Court may be able to deliver them to whomsoever they may decide to be entitled."

He added that there was nothing in the Prize Court rules which provided for the bringing in of third parties against whom a right of indemnity was claimed. Such a procedure was not a part of the old practice of the court of admiralty in prize and it had not been incorporated in the new rules of Prize Court procedure.

Again in the case of the *Wilhelmena*[1] Sir Henry Duke emphasized the accepted principle that "a claim in prize is not a claim under municipal law and cannot be instituted or determined before any municipal tribunal." The Court of King's Bench had decided in 1781, he said, in the case of *Le Caux* v. *Eden*[2] that an action would not lie in a common law court for false imprisonment where the imprisonment was in consequence of the taking of a ship. That was a matter which fell within the jurisdiction of the Prize Court and it was in accordance with the view of Lord Mansfield.

Sec. 43. Admiralty Court No Jurisdiction When *Res* Is in Custody of Prize Court. The relation between the Prize Court and the court of admiralty was brought out in the case of the *St. Tudno,* a British registered ship but against which the Prize Court had issued a decree of detention until further order ("Chile order") on the ground that it was enemy-owned.[3] While still in the custody of the Prize Court, as all such vessels against which "Chile orders" had been issued, were until a final decree was issued, an action *in rem* was brought in the admiralty court by a customs officer at Liverpool, for the forfeiture of the vessel on the ground that she was never entitled to be registered as a British ship.[4] The admiralty court, however, held that inasmuch as the *res* was still in the custody of the Prize Court and would so remain until the issue of a final decree, it had no jurisdiction to deal with the vessel. The Court declared that the facts upon which the decree of the Prize Court was based were binding upon

[1] X Lloyd at p. 379.
[2] 2 Douglas 594. Compare also the case of the *Tergestea* (II Lloyd 149), where Sir Samuel Evans declared that the rights of captors take precedence over claims in civil proceedings prosecuted by mortgagees, holders of bottomry bonds, liens, etc. Also the *Oranje Nassau, No. 2 and Other Vessels* (X Lloyd 274), where Sir Henry Duke held that a prize or the proceeds thereof in the custody of the Court are exempt from process of execution under municipal law so long as the case in prize is pending.
[3] V Lloyd 198; II Br. & Col. Pr. Cas. 272.
[4] III Br. & Col. Pr. Cas. 169.

the admiralty court and could not be questioned in any other proceedings than on appeal against the decree itself. Regarding the claim of the plaintiff that the Crown having requisitioned the vessel, held it subject to the adjudication of the admiralty court, Judge Hill said:

"I fail to see how that can be. They have actual possession of the ship only by temporary requisition from the Prize Court, and must return her into the custody of the Prize Court. In other words, they hold it subject to the adjudication of the Prize Court. The suit in prize is still pending. The ship remains subject to the Prize Court awaiting its final decree."

He continued:

"The *res* remains under the jurisdiction and control of the Prize Court, and, unless the proceedings in prize are in the meantime discontinued by leave of the judge under Order 6, the Prize Court must at some time make a final decree either of release or of condemnation, or otherwise, as the circumstances may require. In making that decree, the Prize Court must have regard to prize—that is, international—law. Such being the position of the *res*, how can the admiralty court, administering the municipal law of this country, exercise jurisdiction over the *res*, while the *res* is still under the control of the Prize Court awaiting its final decree."

Concluding, he said:

"I certainly cannot make the usual order that the vessel be appraised and sold and the proceeds paid into court, such as was made in the *Polzeath* (1916) (85 L.J.P. 241; (1916) P. 117, 241). To do so would be to attempt to override the decree of the Prize Court, which has ordered the ship to be detained by the marshal until further order of the Prize Court. To make a decree that the ship is, or that it be forfeited to His Majesty is equally to deal with the *res* and to attempt to override the decree of the Prize Court."

Sec. 44. Jurisdiction of Seizures on Land, in Ports, Inland Waters, Etc. British Decisions. In earlier times conflicts between the common law courts and the court of admiralty relative to their jurisdiction were frequent, and in several cases during the late war the question was raised as to whether the common law courts or the Prize Court (the successor of the ancient court of admiralty) had jurisdiction. Thus in the case of the *Roumanian*[1] where goods unladen from a ship had been seized on land in the port in which the ship was anchored, it was contended that the Prize Court had no jurisdiction, but that it belonged to the common law courts to deal with the case. Sir Samuel Evans adverting to the earlier conflicts said:

[1] I Lloyd 191; I Br. & Col. Pr. Cas. 75.

"In days gone by, constant contests and quarrels were waged between the common law courts and the court of admiralty as to the jurisdiction claimed by the latter to deal with causes, civil and marine, in ports, harbours, rivers, or creeks, within the body of a county which the common law courts asserted could only be tried at law.

"But the jurisdiction and exclusive jurisdiction of the court of admiralty in prize was never doubted. 'The nature of the ground of the action—*prize or no prize*—not only authorized the Prize Court, but excludes the common law.' Lord Mansfield in *Lindo* v. *Rodney* (2 Dougl. 615 n.). These functions of the Prize Court have now been allotted to this division of the High Court, and contests between the various divisions would not now occur."

Referring, later on, to the contention of counsel for the claimants that even if the goods in this case were confiscable as enemy property seized on land they were not the subject of prize within the jurisdiction of the Prize Court, Sir Samuel observed:

"While I think it is, I cannot see what advantages would accrue to the German company, especially in these days when all the Divisions are parts of one High Court, if the questions arising were admitted (if they could be admitted) to be decided in a common law or other court in this country. To adopt a metaphor employed by Lord Stowell, it would be but to make a change of postures on an uneasy bed."

Upon appeal, the Judicial Committee affirmed the judgment of Sir Samuel Evans.[1] Adverting to the contention of the appellants that it was the local situation of the goods seized which determined the jurisdiction of the Prize Court and since the seizure in this case took place on land and not at sea the courts of common law rather than the Prize Court had jurisdiction, the Judicial Committee said:

"In their Lordships' opinion this contention also fails. The chief function of a court of prize is to determine the question, 'prize or no prize'; in other words, whether the goods seized as prize were lawfully so seized, so as to raise a title in the Crown. In determining this question the local situation of the goods at the time of seizure may be of importance; but it is the seizure as prize, and not the local situation of the goods seized, which confers jurisdiction. If authority be needed for this proposition, it may be found in Lord Mansfield's judgment in the case of *Lindo* v. *Rodney,* reported in a note to *Le Caux* v. *Eden* (2 Dougl. 594, at p. 612). It must be remembered that the jurisdiction of the Prize Court is based in every case upon a commission under the Great Seal. Lord Mansfield pointed out that, in the case before him, the commission under which the

[1] II *ibid.*, 378; I *ibid.*, 536.

Court derived jurisdiction, conferred jurisdiction in all cases of prize, whether the goods sought to be condemned were taken on land or afloat. The same may be said of the commission in the present case. In his opinion, however, it was necessary to draw a distinction in this connection between the jurisdiction of the court of admiralty as a court of prize and its jurisdiction apart from the commission which constitutes it a court of prize. To give the court of admiralty, as such, jurisdiction, the matter complained of must have occurred on the high seas; but in all matters of prize it was not the court of admiralty as such, but the court of admiralty, by virtue of the commission, which had jurisdiction, and this jurisdiction was exclusive, whether the goods seized as prize were on land or afloat."

The Prize Court for Egypt likewise held that it had jurisdiction in the case of the seizure of goods discharged from a German vessel at Port Said.[1] If, said Judge Cator, the Crown should seize a piano in the house of an enemy and advance a claim to it as maritime prize, or merely place it in the custody of the marshal of the Prize Court, the Prize Court alone would have jurisdiction to determine the rights of the parties, but that if it seized the piano as booty on land and took no steps to submit any claim to the Prize Court, the owner would be left to such remedy as he could get from the ordinary courts. Adverting to the lack of a more precise nomenclature in prize law, he said:

"Another source of danger lies in the two meanings contained in the term 'prize.' Sometimes it is applied generally and indiscriminately to all property condemnable by the Court. Sometimes it is confined to goods captured at sea in contrast to such as are taken in port as 'droits of Admiralty'; and when Lord Stowell says in *The Two Friends* (1799) (1 C. Rob. 271; 1 Eng. P. C. 130) that he knows no other definition of prize goods than that they are goods taken on the high seas, *jure belli* out of the hand of the enemy, he is obviously employing the word in its limited meaning. But there is always a possibility that such a remark may be quoted as an exclusive definition of all prize goods, and so tend to obscure the true limit of the jurisdiction of the Court."[2]

In various other cases the British Prize Courts held that their jurisdiction extended to seizures made in ports, rivers, and harbors on inland lakes and on quays and in warehouses and this without regard to whether the goods had been voluntarily landed or discharged or whether they had been "driven on to land by

[1] *Ten Bales of Silk at Port Said*, II Br. & Col. Pr. Cas. 247.
[2] The whole subject of seizures made on land, in ports, rivers, harbors, etc., is discussed more at length in Secs. 143 ff. and 156 *infra*.

the exercise of belligerent power," or whether they were brought in on enemy or neutral vessels.[1]

Sec. 45. The Same. Jurisprudence of Other Countries. The French Prize Council held that seizures of contraband goods in ports, on docks, and in warehouses on land fell within its jurisdiction, but the rule was not applied in the case of non-contraband enemy goods which were landed from neutral vessels.[2] Moreover, it was held not to extend to seizures made on lakes or rivers.[3] The Italian Prize Council on the other hand took jurisdiction not only of seizures made in warehouses and on "dry land" upon which the vessels had been hauled to avoid capture, but also of seizures made on rivers [4] even when the rivers were non-navigable.[5] The German Prize Courts likewise held that the prize jurisdiction extended to seizures made in interior fluvial parts like Antwerp, and in gulfs, bays and all interior waters which serve maritime navigation.[6] The Roumanian prize regulations expressly authorized captures to be made in fluvial waters, a Prize Court was organized to pass upon the validity of captures made on the Danube, and various cases of such captures were judged by the Prize Court. The Russian Prize Court at Sebastopol likewise took jurisdiction and condemned an Austrian vessel (the *Mendl*) captured on the inland waters of the Danube.

Sec. 46. Confiscation by Military Court Does Not Deprive Prize Court of Jurisdiction. The Italian Prize Commission held in the case of *La Bella Scutarina* [7] that the confiscation by a council of war of a ship as an accessory measure of criminal punishment pronounced against its crew for espionage and hostile assistance did not deprive the Prize Commission of its jurisdiction to pass judgment upon the validity of the capture of the vessel as a prize, by reason of the assistance furnished the enemy by the members of the crew.

[1] Among others, see the case of the *Nachtigal* (VI Lloyd 322, destruction of a German ship on the river Bimbia in the Cameroons), the *Königsberg* (VI Lloyd 414, destruction of a German ship in the Rufiji River in German East Africa), the *Sulman Pak and other vessels* (X Lloyd 335, seizure of Turkish vessels on the river Tigris), the H.M.S. *Espiegle and other vessels* (X Lloyd 364, capture or destruction of 26 Turkish vessels on the river Tigris), and the *Kingani* and the *Hedwig von Wissman* (VII Lloyd 108, capture of a German vessel on Lake Tanganyika). As to the cases and the circumstances under which the seizures were made see Secs. 144, 157 *infra*.

[2] Cases cited in Sec. 154 *infra*.

[3] The *Rohlfs*, cited by Fauchille, *Droit Int. Pub.* (t. II, p. 581).

[4] Cases cited *infra*, Sec. 155.

[5] The *Iela and other craft*, Fauchille et Basdevant, *Jurispr. Ital.* 200.

[6] Cases cited *infra*., Sec. 144.

[7] Fauchille et Basdevant, *Jurispr. Ital.* 45.

IV

Non-Justiciable Questions of Prize

Sec. 47. Prize Court No Jurisdiction of Acts of War Not Amounting to Capture. The German Prize Court held that it had no jurisdiction to pass judgment in respect to war measures which did not take the form of actual capture. Thus in the case of the *Geertrudia*[1] where a Dutch vessel had been sunk by the gunfire of a German submarine in the belief that the former was intending to attack the submarine, the Prize Court declared itself incompetent to pass judgment on this act because it was not committed in the exercise of the right of capture. It was essential, said the Court, that there should be a seizure in order to establish the jurisdiction of the Prize Court; here there had been no seizure and no intention to seize but simply a measure of war directed against a ship which was believed to have intended to attack the submarine. The Prize Court said:

> "Prize Courts have to decide upon the validity of captures made during war; their competence is thus clearly determined; they have declared themselves incompetent always when the commander, without proceeding to make a capture or a provisional seizure, has ordered the ship to be taken into a port of the captor state for the purpose of search. For a stronger reason, they must declare their incompetence in cases like this where it is a question of an act of war which has nothing in common with an act of capture and not even having capture as its object."

The Court pointed out that it had already decided in the case of the *Davanger*[2] that Articles 115 and 121 of the prize code relative to damages for the destruction of neutral vessels and cargoes related only to destruction in cases where there were reasons justifying capture. It might happen, for example, that during a naval engagement a neutral merchant vessel is detroyed in the zone of action. If in such a case the neutral owner should allege that the destruction was deliberate and without justifiable cause, certainly it would not be within the jurisdiction of the Prize Court to decide the question.

In line with this reasoning the Prize Court held that it had no jurisdiction to pass judgment upon the legality of the destruction of a neutral ship for navigating the waters of a barred zone, since that was not an act of capture but a war measure, the

[1] I *Entsch.* 302; Fauchille et De Visscher, 228.
[2] I *Entsch.* 232; Fauchille et De Visscher, 178.

legality of which lay outside the jurisdiction of the Prize Court. Again the supreme Prize Court affirmed that the jurisdiction of the Prize Courts was limited to deciding upon the legality of captures; that by the terms of Article 2 of the Prize Ordinance, prizes are enemy or neutral merchant vessels and enemy or neutral goods thereon, *which have been seized in the exercise of the right of capture*, and that the provisions of the prize ordinance relative to the destruction of prizes has reference to destruction after the capture of the ship and for certain specified reasons, such as the transportation of contraband, violation of a blockade, etc., and not to destruction for other reasons. If the destruction of the ship was therefore for another reason and without its being seized as prize it was an act of war, the determination of the legality of which was not within the jurisdiction of the Prize Court.[1]

Sec. 48. No Jurisdiction Where No Capture. Similarly, the German Prize Court held that it had no jurisdiction unless there had been an actual capture. Thus where a neutral fishing vessel had been seized at sea and taken in to a German port for the purpose of visit and search, without there having been any "capture" and which had been released, the Prize Court held that it had no jurisdiction. The necessity of war, said the Court, must sometimes require the "seizure" and taking in for examination of a neutral ship found in a particular maritime zone without there being any justifiable reasons for "capturing" it. Such temporary or provisional seizure did not constitute capture, strictly speaking, the object of which is subsequent condemnation, but a measure of war the legality of which it was not for the Prize Court to judge.[2] But where a ship had been taken into a German port for the purpose of visit and the port authorities had, according to their own declarations, "seized" the ship and had remitted the case to the prize office, the Prize Court held that this was a case of "capture" and that in consequence it had jurisdiction.[3]

[1] The *Eemland and Gaasterland*, I *Entsch.* 388; Fauchille et De Visscher 296. Dr. Colombos ("Treatise on the Law of Prize," p. 46) pronounces this doctrine to be "devastating." It was an ingenious method of interpretation by which the Prize Court endeavored to assist the government in its policy of indiscriminate sinking of merchant vessels, by holding that its jurisdiction extended only to acts done by the captors after the seizure of the vessel, so that if the destruction of the ship took place for any other reason and without the vessel being seized as prize, the Court was without jurisdiction.

[2] The *Bertha Elisabeth*, I, *ibid.*, 58; *ibid.*, 46. To the same effect, the *Goethe*, I, *ibid.*, 85; *ibid.*, 68 and the *Niobe*, Fauchille et De Visscher, 51.

[3] The *Dux*, I *Entsch.* 70; Fauchille et De Visscher, 59.

Finally, the German Prize Court held that it had no jurisdiction to decide upon the ultimate disposition of goods after they had been regularly seized, its competence being limited to the determination of the question as to whether according to prize law they were liable to capture and if so, whether they were confiscable.[1]

Sec. 49. Prize Court Not Guardian of International Conventions. While the British Prize Courts interpreted and applied international conventions and accorded to claimants the benefit of such Conventions as were in force and to which their own Governments were parties, they denied that they were guardians charged with enforcing the observance of those Conventions. Thus in the case of the *Südmark* (*No. 2*)[2] a German vessel seized in the Suez Canal, the claimants contended that the Prize Court should order her release on the ground that she had been allowed to remain in the canal more than 24 hours in violation of the provisions of the Suez Canal Convention of 1888. The Prize Court for Egypt condemned the ship, notwithstanding the breach by the captors of the provisions of the Convention, on the ground that it was not the duty of the Court to enforce the said Convention, and consequently to restore the vessels because of such breach. Upon appeal, the judgment was affirmed by the Judicial Committee. Their Lordships were of the opinion, in the first place, that the only positive obligations created by the Convention were imposed upon the Egyptian and Ottoman governments, but that even if it were otherwise, "a court of prize could not properly constitute itself the guardian of the Convention, and invent and exact penalties for its non-observance, when no such penalties are imposed by the Convention itself." It is true, their Lordships added, that the Prize Court "must adjudicate on these matters (captures, etc.) in accordance with international law, including international agreements; but the international law which the Court is to enforce is that branch of international law including international agreements, which relates to matters of which the Court is to take cognizance, and upon which it is to adjudicate. It has no such roving jurisdiction as suggested by the appellants' counsel." And they concluded:

"If the neutral allow the prize to remain longer than is warranted by the circumstances, it is no doubt guilty of an unneutral act, which may well be made the subject of diplomatic complaint; but their Lordships

[1] The *Kiew*, I *ibid.*, 241; *ibid.*, 184.
[2] VI Lloyd 343; II Br. & Col. Pr. Cas. 473.

cannot think that the captor's Prize Court has any jurisdiction to entertain the question, or is bound, if it consider that there has been an unneutral act, to release the prize on that account."

Sec. 50. Prize Court No Jurisdiction of Political, Military, or Diplomatic Questions. Naturally a Prize Court has no jurisdiction to decide disputes of a political character such as involve relations between states. Thus the Judicial Committee of the Privy Council stated that "the seizure of a vessel in a neutral port, though a breach of neutrality, would not in a court of prize afford any ground for its release," [1] and that a seizure so made in violation of the territorial sovereignty of the state was a matter between sovereigns and therefore non-justiciable in a Prize Court.[2] A Prize Court therefore has no jurisdiction to pronounce judgment upon the conduct of naval officers charged with having made a capture in neutral waters and to "evaluate imponderable wrongs which lie outside the category of those with which it is wont to deal." "A court of prize is not, as such, a disciplinary tribunal for officers in His Majesty's navy, charged with the correction of errors committed by them while discharging their duties." Any complaint, therefore, against such officers, which a neutral government may have or any claim for reparation which it may wish to make for the violation of its territorial sovereignty "would be fitly preferred through diplomatic channels to His Majesty's government for examination and redress.[3]

Similarly a Prize Court has no jurisdiction to award pecuniary compensation to a neutral power for the unintentional violation of its sovereignty through the capture of a ship in its territorial waters. "Amends for such occurrences are not subject to judicial determination"; instances of the recognition of an obligation to make redress in such cases are not lacking, but they have been the result of diplomatic arrangement and not of judicial decisions." [4]

Sec. 51. The Same (Continued). Likewise it is not for a Prize Court to concern itself too closely with political or military considerations which determine the exact procedure of naval commanders. Thus in the case of the *Derflinger and other ves-*

[1] The *Achaia*, V Lloyd 63; II Br. & Col. Pr. Cas. 45.
[2] The *Düsseldorf*, ix, *ibid.*, 1; III, *ibid.*, 466.
[3] See further as to this case, Sec. 484 *infra*.
[4] The *Valeria*, IX Lloyd 23; III Br. & Col. Pr. Cas. 644. See also the case of the *Pellworm;* IX, *ibid.*, 170; III, *ibid.*, 1053. Further discussion of these cases Secs. 169 and 484-5 *infra*. Compare also the case of the *Bangor*, V, *ibid.*, 308; II, *ibid.*, 206.

sels [1] which had been seized in Egyptian ports, taken out to sea where they were formally captured and then brought back to the Egyptian ports and put in the custody of the Prize Court, the naval prize tribunal, adverting to the suggestion that this procedure was "an unnecessary risk and expense and a purely dramatic and almost farcical act," said: "It is not for us to inquire minutely into the political considerations which, owing to the peculiar position of Egypt and the [6th Hague] Convention, which for some purposes neutralizes the Suez Canal, apparently induced His Majesty's government to ordain this method of procedure." Similarly, the French Council of State declared that it had no jurisdiction to pass on questions involving generally international relations between France and other powers, such in particular as police measures adopted by the French government in regard to neutral ships and which it considered necessary to the national defense.[2]

The Judicial Committee in its argument in the *Stigstad* case [3] in support of the belligerent right of retaliation against an enemy which has violated the law of nations, adverting to the circumstance that the British government had already "by the fact as well as by the recitals of the Order in Council" declared that Germany was guilty of such violation, stated that "an independent inquiry into the courses of contemporary events, both naval and military, is one which a court of prize is but ill-qualified to undertake for itself. Still less would it be proper for such a court to inquire into the reasons of policy, military or other, which have been the cause and are to be the justification for resorting to retaliation for that misconduct.'" In short, the recital in the Order in Council proclaiming measures of retaliation, that the enemy had by his misconduct created a justification for retaliation, was conclusive as to the facts and binding upon the Prize Court. It therefore had jurisdiction and it was its duty to give effect to the retaliatory measures adopted.

Sec. 52. Prize Court No Jurisdiction of Questions Arising Out of Captures on Land in Interior of Country. In the case of the *Anichab and Other Vessels and Craft* [4] where the Prize

[1] VIII, *ibid.*, 548; III, *ibid.*, 497. Compare also the following from Lord Parker's opinion in the *Zamora* (II Br. & Col. Pr. Cas. at p. 12): "The acts of a belligerent power in right of war are not justiciable in its own courts, unless such power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the courts of any other power."

[2] The *Tamborah* (28 *Rev. Gén. de Droit Int.*, 1921, *Jurispr.* p. 6).

[3] V. *ibid.*, 386; III, *ibid.*, at p. 351.

[4] IX Lloyd 118; III Br. & Col. Pr. Cas. 611. See also Secs. 156 and 492 *infra.*

Court held that the seizures of certain enemy craft at Luderitz Bay and Swakopmund in German South East Africa were subjects of maritime prize jurisdiction but that the seizure of other craft which had been taken by land into the interior of the country and captured by the military forces there were not the subject of maritime prize and must therefore under article 53 of the Fourth Hague Convention be restored to the owners with indemnities at the conclusion of peace, it was argued by counsel that the Prize Court had no jurisdiction to award the indemnities referred to but that it was a matter for diplomatic settlement "at the peace." Lord Sterndale in his judgment adopted this view. Adverting to the terms of the Fourth Hague Convention relative to the restoration with indemnities "at the peace" of captured "appliances" for the transport of persons or goods, said:

"It seems to me quite clear that counsel for the Crown is right in saying that does not confer on me, sitting as judge in prize, the right, or impose on me the duty, of settling those indemnities. They are to be settled at the peace, and they are to be settled, as it seems to me, by diplomatic action. I do not think, therefore, on that ground I can give any judgment for any indemnity. There is another ground, and that is this. It seems to me that wherever a captor brings articles into the Prize Court and asks for a condemnation of those articles which he has seized, if he has seized them wrongly and seized them as prize, this Court has jurisdiction to say, 'You seized those goods without any reasonable ground whatever, and having seized them without any reasonable ground whatever as prize, and brought them into court as prize, the Court has jurisdiction to say that you must pay damages for doing it.' But in order to arrive at that conclusion, you must say that there could be no reasonable ground, not that it was wrong, but that there could be no reasonable ground, for seizure."

And he added: "If there is to be any indemnity in respect of these craft under the Hague Convention, that is a matter which will have to be settled elsewhere." The judgment was affirmed on appeal by the Judicial Committee.[1]

The Italian Prize Commission declared itself without jurisdiction to pass upon the validity of the capture of a floating pontoon belonging to an enemy state, which had been constructed by a company for exclusive commercial purposes and which by reason of its structure and lack of means of offense and of motor powers, could not be considered as an enemy war vessel. The Commission added, however, that the Italian state had a right to appropriate the pontoon without the necessity of prize adjudi-

[1] *Ibid.*, 132; *ibid.*, 993.

cation, in virtue of the principles of international law and in particular article 53 of the Fourth Hague Convention of 1907 respecting the laws and customs of war on land, which authorizes a belligerent to seize generally all movable property belonging to the enemy state.[1]

Sec. 53. Reparations for Violation of Treaties. Reference may be made here to the case of the *William P. Frye* discussed in the preceding chapter [2] where it was contended by the German government and denied by that of the United States that the validity of the act of destruction of an American sailing vessel and the amount of damages to be paid therefor were questions which must be submitted to the German Prize Court and which, in spite of the American denial, were in fact submitted to and decided by the Court. It may be observed, however, that the issue was not whether the Prize Court possessed jurisdiction to pass upon the validity of the destruction of prizes in general, but whether in view of the German government's admission of liability in this particular case it was necessary or appropriate to submit to the Prize Court the question of the validity of the act of destruction and the amount of the damages to be paid, or whether it was a matter to be settled through the diplomatic channels. As stated above, both parties made concessions by agreeing to submit to joint experts the determination of the amount of the damages and to arbitration the question of the legality of the sinking of the vessel.

Sec. 54. Jurisdiction of Prize Court in Respect to Trading with the Enemy. Does a Prize Court have jurisdiction over questions arising out of trading with the enemy and especially to condemn the goods of an allied national dispatched on a neutral vessel and destined for delivery to an enemy house, in pursuance of a contract made prior to the outbreak of war? The British Prize Court adopted the affirmative view in the case of the *Panariellos*,[3] this on the general principle that the illegality of intercourse with the enemy is a rule of international law as well as of English municipal law and that since the Prize Court is charged with administering international law it has jurisdiction to enforce the rule forbidding such intercourse and to confiscate the goods belonging to a subject of an allied state, who engages in such traffic. Among the propositions laid down by Sir Samuel Evans was that "where such illegal intercourse is proved between

[1] The *Monfalcone*, Fauchille et Basdevant, *Jurispr. Ital.* 498.
[2] Sec. 2 *supra.*
[3] 1 Br. & Col. Pr. Cas. 195.

allied citizens and the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to capture by an allied belligerent, and is subject to condemnation in that belligerent's own Prize Courts." [1] But the German Prize Court at Hamburg held that it had no jurisdiction of a case involving a German vessel seized on the charge of trading with the enemy.[2]

V

Ancillary Jurisdiction

Sec. 55. British Doctrine. It is well established that a British Prize Court has jurisdiction not only to determine the legality or illegality of captures but also to pass upon all incidental or ancillary questions arising out of a capture. This includes jurisdiction to allow freight, award damages and indemnities, assess costs, require security for costs, etc.[3] The jurisdiction of the British Prize Courts over such matters is very wide and embraces nearly every conceivable claim for what may be described as "damages." Unlike that of the German Prize Court it extends even to damages for injuries sustained by a ship (e. g., damage to its rudder) in consequence of its seizure and detention.[4] Unlike the German Prize Courts their jurisdiction is held to extend also not only to claims against the state for damages but to those of an interested private party against another, for example, a claim of shipowners against the cargo owners for losses and expenses resulting from deviation, detention or unlivery of the cargo.[5]

Sec. 56. Claims for Freight Where Cargo Is Released. British Decisions. In the Case of the *Corsican Prince*,[6] Sir

[1] See also the case of the *Parchim* (IV Lloyd 388; I Br. & Col. Pr. Cas. 579), where Sir Samuel Evans held that upon the outbreak of war between Russia and Germany it became illegal for certain Russian shipowners to continue to perform their contract with German charterers and that after August 4, 1914, when Germany became the common enemy of Russia and Great Britain, the Prize Court had power to deal with a Russian ship engaged in illegal trading. Compare also the cases of the *Bärenfels, No. 2* (I Br. Col. Pr. Cas. 395), the *Salti et Fils* v. *Procurator-General* (III, *ibid.*, 374); the *Kildonian Castle* (V Lloyd 222) and the *Achilles* (VII Lloyd 1).

[2] The *Nyanga*, cited by Huberich in 18 *Columbia Law Review* 512. Not reported in the *Lutscheidungen*.

[3] As to the cases in which such allowances were made or refused, see Chap. XVII.

[4] The *Craigisla*, Decs. of the Prize Court of South Africa, p. 73.

[5] The *Domald*, IX Lloyd 356.

[6] II Lloyd 198; I Br. & Col. Pr. Cas. 178. Further discussion of this case, *supra*, Sec. 37; also Secs. 70, 120, 479 *infra*.

Samuel Evans discussed at great length the jurisdiction of the Prize Court under this head and reviewed exhaustively the decisions and the opinions of text writers on the subject. In this case a claim was put forward by the British owners of the vessel for freight on a cargo which had been released without being brought before the Prize Court for adjudication, but which had been sold upon order of the Prize Court because of its threatened deterioration. Counsel for the Russian bank, part owners of the cargo, admitted that the Prize Court had ancillary jurisdiction but contended that inasmuch as the cargo had been restored to the owners it was no longer subject to the jurisdiction of the Prize Court but fell within that of the common law courts. The question was important to the claimants because at common law the shipowners would not be entitled to freight since the bill of lading contract had not been carried out, whereas if the Prize Court had jurisdiction it could allow *pro rata* freight. Sir Samuel Evans decided that the Prize Court had jurisdiction, notwithstanding the fact that the goods had been released to the owners without prize adjudication. Adverting to the importance of the question and the contentions of counsel, he said:

"The matter which now arises for decision is whether the claim of the shipowners, and the questions as to the rights of the shipowners and the cargo owners in respect of the proceeds, are to be determined in a common law court in the King's Bench Division, or in the prize proceedings in this Division. I apprehend that the principles and practice governing this matter are the same since the assignment to this Division of the Prize Court jurisdiction of the High Court, under the Judicature Act, 1891, as in former times when the jurisdiction in prize was vested in and exercised by the High Court of Admiralty. The subject is one of general importance affecting our judicature, and I propose, in the first place, to deal with it upon lines applicable to proceedings of this nature generally; and then to state the particular facts of this case to which the principles and practice governing such cases have to be applied. Counsel for the shipowners, in their argument, cited many authorities for the proposition that this court, exercising its prize jurisdiction, had the exclusive right to determine such questions as those in issue, and not a common law court; and that such determination should be in accordance with the prize law. It has been my duty to examine those authorities and others throwing light upon the subject. Having done this, it does not appear to me to be necessary or useful to go through the cases in detail, because the examination of them shews that the results which are summarized in text-books of various authors—themselves authorities of acknowledged renown—are abundantly justified by the decided cases. Mr. Justice Story, who, as an exponent in treatises and judgments of matters relating to prize law, is hardly second to Lord Stowell himself, in his *Notes on the Principles and Practice of Prize Courts,* writes as follows:

"'When once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents. It will follow prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title. . . . It may also enforce its decrees against persons having the proceeds of prizes in their hands, notwithstanding no stipulation, or an insufficient stipulation, has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* can be found, and is not confined to the remedy in the stipulation; and in these cases the court may proceed upon its own authority *ex officio*, as well as upon the application of parties; nor is the court *functus officio* after sentence pronounced, for it may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject-matter. The Prize Court has also . . . exclusive authority as to the allowance of freight, damages, expenses, and costs in all cases of captures, and though a mere maritime tort unconnected with capture *jure belli* may be cognizable by a court of common law; yet it is clearly established that all captures *jure belli*, and all torts connected therewith, are exclusively cognizable in the Prize Court.' (Pp. 30-32.)"

Then reviewing the decisions and the opinions of text writers, Sir Samuel added:

"The Prize Court has constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo, and have adjudicated upon such claims whether the ship or cargo has been released, and when both ship and cargo have been released; and apparently no action involving questions in similar cases were brought in any common law court. And this is obviously for grounds solid in justice and convenient in practice, because the two courts administered two different codes or systems of law; the Prize Courts deal with claims in accordance with the Law of Nations, and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-appearance or non-completion of the contract of affreightment; whereas common law courts would only determine the consequences of the strictly legal contractual obligations of the parties."

He observed, finally, that the Prize Court had its own special machinery (registrar, merchants, marshal, etc.) for dealing with such matters; consequently there were reasons of convenience as well as of law why the Prize Court should have jurisdiction of such claims.

Sir Samuel reaffirmed the principle here enunciated, in the case of the *St. Helena*.[1] In this case the shipowners brought an action in a common law court (King's Bench division) for *pro rata* freight but the decision was against their claim. They thereupon resorted to the Prize Court, the jurisdiction of which

[1] IV, *ibid.*, 289; I, *ibid.*, 618.

the cargo owners contested on the ground that the matter was *res judicata*. Sir Samuel overruled the objection. He did not think that the King's Bench division had decided the exact question which he was asked to decide. The case there was an action upon a contract for a certain sum and the judge was not asked to decide upon principles which are applicable to cases of this description in the court of prize.

"The plaintiffs," he said, "did not appear before him and say, 'We are not entitled according to the common law—according to the municipal law—to anything at all, but we hope that you will apply the equitable principles which have been applied in the Prize Court and give us some sum in lieu of the full freight.' That application was never made, and the learned Judge never decided upon any such claim as that. Upon the claim which was made before him—a claim under the municipal law—he decided and pronounced judgment. The claimants now come here and say that there was no jurisdiction in the King's Bench Division which would entitle the learned Judge to deal with the matter upon the footing on which it ought to be dealt with in this Court. Therefore they say, 'So far as our present claim is concerned, we did not make it in the Court of King's Bench, and we could not do so because it had no jurisdiction to deal with such a matter.' In this Court I have jurisdiction to deal with it if it is a matter arising out of a seizure as prize, and I think it is perfectly clear, according to the evidence, not only that there was a seizure as prize of this cargo, but that such rights as the claimants have for the carriage of the cargo must be determined in accordance with the principles in prize."[1]

In the case of the *Iolo*[2] Sir Samuel again affirmed the jurisdiction of the Prize Court in respect to claims for freight on cargoes released. He said: "I have pointed out that, according to the authorities and practice of the court of prize, the jurisdiction of the court to deal with freight is not affected by the release of the cargo, even if it had been released upon the decision of The Court that it had been wrongfully seized, which was not the case in relation to this cargo."

Finally, the Judicial Committee in the case of the *Lisa*[3] decided in 1923 affirmed that the Prize Court had jurisdiction to deal with all incidental matters arising out of the seizure of a cargo which was placed in the custody of the Court, notwithstanding that it had been subsequently released to the claimants.

The French Prize Council on the other hand declared itself in-

[1] Further consideration of this case, Sec. 478 *infra*.
[2] 11 Lloyd 336; I Br. & Col. Pr. Cas. at p. 301.
[3] 18 Lloyd's List Law Reports 29.

competent to hear and allow claims for freight on cargoes seized and released to the neutral owner.[1] But it asserted jurisdiction in a case where English owners of a cargo on an enemy ship claimed freight which they had been obliged to pay after the release of the goods by the French state [2] and where the loss of the freight claimed was the result of the seizure of goods the legality of which the Prize Council had to determine.[3]

The question whether the Prize Court has jurisdiction to allow freight on contraband goods condemned was decided in the affirmative by the Judicial Committee of the Privy Council, in the case of the *Prins der Nederlanden.*[4] The Procurator-General contended that the Court had no such jurisdiction and that freight was never allowable for the carriage of contraband goods. Their Lordships held that the allowance of freight was a matter within the discretion of the Court and ought not to turn on the shipowners' knowledge or ignorance of the character of his cargo.[5]

Sec. 57. The Same. Claims for Damages. In the case of the *Wilhelmena* [6] (1923) Sir Henry Duke was called upon to decide the question whether the Prize Court had jurisdiction over a claim for damages instituted against The Procurator-General, for the alleged illegal seizure and detention of a neutral fishing trawler and its cargo, in view of the Public Authorities Protection Act, 1893, which allows actions against public officials only subject to certain specified conditions. The Procurator-General contended that he was protected against the action by the above mentioned law and that consequently the Prize Court had no jurisdiction to hear the claim. Sir Henry held, however, that the Prize Court being charged with administering international law, the act in question did not prevent proceedings for damages being brought in the Prize Court even though they were not brought within the true limit fixed by the Act. Since the cargo had been sold and the proceeds paid into the Court its jurisdiction had undoubtedly attached. In the course of his judgment Sir Henry, speaking of the purpose of the Naval Prize Act of 1864 and the effect upon it of the Act of 1893, said:

"That Act, with its various regulations as to things to be done in prize, no doubt imposes some statutory duties upon captors, as I have already indicated, as well as upon persons concerned in the matters of administra-

[1] The *Gorontalo*, Fauchille, *Jurispr. Franc.* 73: and the *Ogliastra*, *ibid.*, 82.
[2] The *Barmbek*, *ibid.*, 270. [3] The *Atlas*, *ibid.*, 39.
[4] VI Lloyd 205; III Br. & Col. Pr. Cas. 943.
[5] See further, Sec. 481 *infra*. [6] X Lloyd 371.

tion with which the statute deals. It does not, however, purport to deal with the substantive law of prize, the right of capture, and the relative interests of captor and claimant in captured goods. Sect. 55 of the Act indeed expressly provides that courts of prize shall as heretofore take cognizance of and judicially proceed upon any capture, seizure, prize or reprisal and hear and determine the same according to the course of admiralty and the law of nations. How and where an action or proceeding for breach of duty under the Act of 1864 may be judicially dealt with, it is not necessary to consider, though it may well be considered that *prima facie* such a delinquency falls to be adjudicated upon in a municipal court. At any rate, the statutory limitation upon such an action or proceeding which was expressed in the Act of 1864 is not a limitation upon a proceeding in prize, and the Act of 1893 does not in terms alter its character or extend its operation. Since the Naval Prize Act, 1864, did not introduce any limits of time for proceedings in prize, properly so called, and the Public Authorities Protection Act, which deals expressly with the limitation in that statute, does not in express terms extend its scope, and is not primarily or specifically an Act to alter the law of prize, I am satisfied that the Legislature did not intend to make, and has not by the Act of 1893 made, the drastic change in the law of prize which has been contended for on behalf of the Crown in this case."

Sec. 58. The Same. French Jurisprudence. The established doctrine in respect to French prize jurisdiction is that the Prize Council is incompetent to hear and determine claims for damages except where the decision is accessory to the judgment on the question of the legality of the capture. "To judge according to the law of nations," says Bardoux, "whether the capture is legal, such is the function of the council . . . if therefore controversies arise between different claimants relative to the ownership of the property captured, it is not for the council to decide the difference unless that is indispensable to determine the validity of the capture." [1] This principle was definitely laid down by the Prize Council in the cases of the *Borussia* and the *Ludwig* in 1870 and 1871.[2] It will not, therefore, as the British courts will, entertain jurisdiction of a claim for damages independently of and apart from the main question of the validity of the capture. If such a claim is made the council must refer it to a designated tribunal of commerce to make the liquidation. Thus during the late war it declared itself incompetent to hear the claim of the owner of a neutral ship which had never been captured and which had been authorized after the debarkation of the cargo to continue its voyage,[3] or the claim of a neutral for the

[1] *Jurisprudence du Conseil des Prises* 51; compare also De Boeck, *De la propriété Privée Ennemie*, p. 372. [2] Texts in Barboux 52, 53.
[3] See, among others, the cases of the *Insulinde*, Fauchille, *Jurispr. Franc.* 21; the *Atlas*, *ibid.*, 40; the *Fortuna*, *ibid.*, 46; and the *Jiul*, *ibid.*, 26.

expense of debarkation and discharge of captured goods which were subsequently released.[1] The attempt to recover damages through petition to the Council of State acting in its contentious capacity where the claim was not accessory to the question of validity of capture resulted in failure, that body holding that it was incompetent to afford the relief sought.[2]

Sec. 59. The Same. German, Austrian, and Italian Jurisprudence. The German Prize Court did not, like the French Prize Council, refuse to take jurisdiction of claims for damages where the claim was not accessory to the main decision as to the legality of the capture. Thus it declared itself competent to hear and determine the claim of a Norwegian shipowner whose vessel had been seized and subsequently released by the prize office without the question of the validity of the seizure being brought before the Prize Court.[3] In accordance with British prize jurisprudence it also took jurisdiction of claims for damages filed by owners of innocent cargoes which had been released without prize adjudication, where the ship transporting them had been seized.[4]

But it declared its incompetence to hear the claim of the owner of a ship and cargo wrongfully captured, for reimbursement of a sum advanced by him for expenses for the conservation of the ship and cargo;[5] and likewise also the claim of a neutral shipowner for losses occasioned by the taking of his vessel into a German port for the purpose of visit when the visit was not followed by capture[6] and a claim for loss on account of the deterioration of the goods seized.[7] The incompetency of the Prize Court was even declared in the case of claims of the last mentioned character, when the loss was due to prolonged detention of a neutral ship which was finally released for lack of sufficient reasons justifying confiscation.[8]

The Prize Court of Austria-Hungary declared itself without jurisdiction to hear a claim for damages put forward by the master of a neutral ship in behalf of the crew[9] and a claim for damages made by the neutral owners of a cargo, which had been

[1] The *Gorontalo*, *ibid.*, 72.
[2] The *Tamborah*, *Rev. Gén. de Droit Int. Pub.*, 1921, *Jurispr.*, p. 6.
[3] The *Norefos*, I *Entsch.* 30; Fauchille et De Visscher, *Jurispr. All.*, 23. Among other decisions to the same effect see the *Hasenkamp*, the *Bertha Elisabeth* and the *Sydney Albert*.
[4] The *Zaanstroom*, I *Entsch.* 118; Fauchille et De Visscher, 99.
[5] The *Alfred Hage* I, *ibid.*, 25; *ibid.*, 20.
[6] The *Bertha Elisabeth*, I *Entsch.* 58; Fauchille et De Visscher, 46.
[7] The *Thorsten*, I *Entsch.* 253; *ibid.*, 192. To the same effect see the *Batavier VI*, the *Norden* and the *Koningin Regentes*.
[8] The *Bretland*, II *Entsch.* 230.
[9] The *Kephallonia, Normal Verordnungsblatt*, 14 *Stück*, 1917, p. 204.

sunk on an enemy ship transporting them, the ship being a public vessel or a ship of war.[1]

The Prize Commission of Italy was given jurisdiction by the decree of August 1, 1915, of "all claims for reparation for damages arising out of the exercise of the right of capture during the existing war.[2] But it was limited to claims against the state and did not extend as in England to claims filed by one interested private party against another, for example the claim of an owner against a shipper.[3] In consequence of this rather general grant of jurisdiction, the competence of the Prize Commission was rarely contested.

The Chinese Prize Court declared itself without jurisdiction to hear a claim for damages made by the owners of a ship which had been lawfully captured and condemned.[4]

Sec. 60. Prize Court Usually No Jurisdiction of Captures of Enemy Public Vessels. By the terms of the German prize code the jurisdiction of the Prize Court does not extend to the passing of judgment upon the legality or illegality of the capture of public vessels of the enemy; they are confiscable without prize adjudication.[5] German prize jurisdiction is therefore limited to the determination of the validity of the capture or destruction of *merchant* vessels only, and the ancillary questions arising out of the same. The French instructions of 1916 (Art. 118) also apparently do not require an enemy warship to be placed in the custody of the Prize Court for adjudication. In the case of the *Emden*,[6] a German cruiser captured by the British naval forces but which was never placed in the custody of the marshal of the Prize Court, the Crown asked for condemnation, stating at the same time that being a warship it was not necessary under Order X rule of the British Prize Court rules that the vessel should be placed in the custody of the marshal. An order for condemnation was made by Sir Samuel Evans and similar orders were made on the same day in the cases of several other German armed vessels.[7] But later in the case of the *Baden* and the *Santa Isabella*,[8] two German colliers attached to the German fleet and

[1] Among others, the *Ville de la Ciötat*, *ibid.*, *Stück* 40, p. 502.
[2] Text in Fauchille et Basdevant, *Jurispr. Ital.* Annexe No. 16, p. xxii.
[3] See the case of the *Chrysopolis*, *ibid.*, 224.
[4] The *Silesia*, Judgments of the High Prize Court 88. Compare also the cases of the *Albenga* and the *Fortuna*.
[5] Prize Code Art. 2. Compare also Art. 99 of the U. S. Instructions for the Navy (1917) to the effect that prize adjudication is not necessary in the case of captured "public vessels in the military service of the enemy."
[6] X Lloyd 52.
[7] *Ibid.*, p. 53, note.
[8] Unreported cases, cited by Professor A. P. Higgins in the *Br. Yr. Bk. of Int. Law*, 1925, p. 103.

sunk in the Battle of Falkland Islands, Sir Samuel apparently proceeded on the theory that being public enemy vessels, there was no necessity for prize adjudication. "It is quite clear," he said, "that both these vessels were enemy vessels. They were also apparently in attendance upon the vessels of the German government. But they are here treated not as part of the fleet, but as enemy vessels which could be properly treated as prize." This view, which has the support of leading authorities[1] that title to a captured enemy warship passes immediately to the captor state is probably in accord with the generally accepted rule of international law, but it does not appear to be in harmony with the practice of the British Prize Courts or with the provisions of the Naval Prize Act of 1864 and the Prize Court rules of 1914 which seem to provide for Prize Court proceedings in the case of captured enemy public Vessels.[2]

Sec. 61. What Are "Merchant Vessels"? The category of "merchant vessels" (*navires de commerce*), in the sense of the prize code, includes, according to the German decisions, all vessels not owned by the state, that is, all privately owned ships, subject only to the qualification that they must be craft of some importance by reason of their build or tonnage.[3] Thus it was held that a dredge boat was a "merchant" vessel in the sense of the prize code and that the Prize Court was therefore competent to pronounce its confiscation[4] and, similarly, a pleasure yacht which had several times crossed the ocean but which at the time of capture was employed in the navigation of interior canals.[5] But on the contrary, certain tugs and lighters, by reason of their small size and tonnage were held not to be "merchant vessels" and consequently the question of the legality of the cap-

[1] For example, Oppenheim, *op. cit.*, vol. II, Sec. 185, and Cobbett, *Leading Cases*, Vol. II, pp. 275, 311.

[2] See an article entitled "Ships of War as Prize," by Professor Higgins, in the *Br. Yr. Bk. of Int. Law*, 1925, pp. 102 ff. He concludes that the necessity for such proceedings arises from the provisions of the royal proclamation granting prizes to the captors, which it is customary to issue at the beginning of war, since no title can be acquired by them until condemnation has been decreed by the Prize Court. But if no such proclamation is issued prize proceedings are unnecessary and the property would pass to the Crown immediately upon capture. Compare also Colombos (*op. cit.*, p. 33) who remarks that "from a correct point of view war ships are put in for adjudication by a prize court for the purpose of prize money only, as property passes immediately on capture."

[3] The *Assistent* and *Undine*, I *Entsch.* 150; Fauchille et De Visscher. *Jurispr. All.*, 116; the *Primavera*, I, *ibid.*, 194; *ibid.*, 147; the *Comte de Smet de Naeyer*, I, *ibid.*, 209; *ibid.*, 160; the *Primula*, I, *ibid.*, 17; *ibid.*, 14; the *De Brussels* 31, I, *ibid.*, 310; *ibid.*, 237.

[4] The *De Brussels* 31 (*supra*).

[5] The *Primavera* (*supra*).

ture of such craft did not fall within the jurisdiction of the Prize Court.[1]

Similarly, the French Prize Council declared that it was without jurisdiction to pass upon the validity of the capture of enemy war vessels, its competence being limited to merchant vessels or cargoes. Decisions as to the validity of the capture of enemy public vessels belong solely to the ministry of marine.[2]

The Austro-Hungarian Prize Court, following the view of the German Prize Courts, held in numerous cases that it was without jurisdiction to pass upon the validity of the capture of ships belonging to the enemy state, its competence being limited to the capture or destruction of merchant vessels, that is, privately owned vessels.[3]

Sec. 62. Jurisdiction Over Proceeds of Sale of Enemy Property. The jurisdiction of the Prize Court to condemn enemy cargoes naturally includes jurisdiction to follow and condemn the proceeds when they are sold by agents of the owners or by the shipowners, because of their perishable character, and when the proceeds have been paid into the prize fund.[4] And this jurisdiction continues so long as the proceeds remain in the custody of the Prize Court, even though a decree has already been made for their release. Thus where a decree had been made releasing to the shippers the proceeds from the sale of certain goods, the Prize Court held that it had jurisdiction, while the proceeds were still in the custody of the Court, to rescind its original decree and substitute another, awarding the shipowners (who had not appeared at the trial) one-half the proceeds, as a reasonable allowance for freight.[5] Objection was raised by the shippers that the jurisdiction of the Prize Court had expired with the issue of the original decree and that the Court was henceforth *functus officio* so far as this case was concerned. They relied upon the case of the *Egyptian Bonded Warehouse Co.* v. *Yeyasu Goshi Kaisha*[6] where it was held that the Prize Court

[1] The *Assistent* and *Undine* (*supra*).

[2] The *Rohlfs* and the *Pass of Balmaha-Seeadler*, *Rev. Gén. de Droit Int. Pub.*, 1921, *Jurispr.*, p. 1. The latter was originally an American merchant vessel which had been captured by the Germans, converted into a war vessel and recaptured by the French naval forces.

[3] The *Commodore*, *Normal Verordnungsblatt für die K. u. K. Kriegsmarine*, 1917, 11 *Stück*, p. 140; the *Cornigliano*, *ibid.*, 28 *Stück* 337; the *Angelo*, *ibid.*, 340; the *Oliver*, *ibid.*, 343; the *Citta di Messina*, *ibid.*, 368; and the *Schkodra*, 21 *Stück* 216.

[4] The *Clan Mactavish* (VI Lloyd 160); the *Soldier Prince* (VI, *ibid.*, 163); and the *Glenroy* (VI, *ibid.*, 200).

[5] The *Steamship San Jose*, X Lloyd 429.

[6] *Supra*, Sec. 42.

had no jurisdiction to decide as between parties, some of whom had not been parties in the proceedings, when the goods were released to the claimants. Sir Henry Duke pointed out, however, that the present case was distinguishable from that one in that the goods in the latter case had ceased to be in the custody of the Court and that proper legal steps had been taken to deliver them to the claimants, whereas, in the present case the proceeds still remained in the custody of the Court and consequently the jurisdiction of the Prize Court had not expired. He added that a claimant who had not appeared at the hearing had a right to have a decree reviewed, when if left to stand it would work an injustice to him.

Sec. 63. Jurisdiction of Prize Court Expires Only with Release of Property. Except in the case of enemy warships [1] the British Prize Courts will not exercise jurisdiction over captured property or the proceeds therefrom which at the time of the institution of proceedings is not in the custody of the marshal of the Prize Court. When the property has been released and delivered to the claimants the jurisdiction of the Prize Court over it expires. But there must be an actual release before the jurisdiction of the Prize Court is exhausted. Thus where the Procurator-General after the institution of proceedings consented to an order for the release of the goods but the order was not made and they remained in the custody of the marshal and the Procurator-General finding himself in the possession of additional information withdrew his consent and asked for condemnation, the Prize Court held that there being no concluded agreement with the claimants and the consent to the release of the goods not being judicially recorded and the goods being still in the custody of the marshal, the matter was not *res judicata* and the Court had jurisdiction to deal with the goods.[2] The Court admitted, however, that if the marshal had parted with the goods The Court would have had no jurisdiction. The judgment was affirmed by the Judicial Committee which admitted that the plea of *res judicata* was allowable in prize procedure but stated that it could not be entertained unless the record of the act of the Court, on which it was founded, was forthcoming or some valid reason was given why it could not be produced.[3]

[1] See the case of the *Emden*, X Lloyd 52.
[2] The *Annie Johnson and Other Vessels*, X, *ibid.*, 405.
[3] *Ibid.*, at p. 417. Compare also the unreported case of the *Hofsfos* where the proceeds having been transferred from the Prize Court to the Exchequer the jurisdiction of the Court ceased.

Likewise where The Procurator-General had consented to the release of goods before the issue of the writ and an order had been issued by the registrar for the release but which was found upon investigation to be a "mere empty form" and the record of which was not that of the Prize Court but a "mere erroneous representation arising on a mistake of fact," the jurisdiction of the Prize Court to hear the petition of the Crown (which had subsequently withdrawn its consent) for the condemnation of the goods, had not expired and the consent given by The Procurator-General under the circumstances mentioned was no bar to prize proceedings.[1]

Sec. 64. Duty of Prize Court to Preserve the *Res* in Its Custody. In the case of the *Zamora*[2] where the Crown had requisitioned a quantity of copper on a neutral vessel prior to adjudication by the Prize Court, Sir Samuel Evans held that the claimants were not entitled to have the property preserved *in specie* until the issue of a final decree determining its fate. On this point, he said:

"At the outset, the capture or seizure as prize vests the possession of the property captured or seized in the Crown, and when the property comes into the custody of the marshal of this Court it is subjected fully to the jurisdiction of this court. The Court has inherent powers to deal with the property brought within its jurisdiction as it may deem fit in the exercise of its discretion. It has, in my opinion, such a power, apart from any rules of practice made under the Prize Acts of 1864 or 1894. It could, without any such rules, order a sale of perishable goods before condemnation; or order a sale of goods in order to avoid difficulties or expense of warehousing, or removing, or for any other reason which appeared sufficient to the Court.

"In my view persons who lay claim to property captured or seized, have no right by any rule of international law to demand that the property should be preserved *in specie* until the final decree determines whether it is to be released or to be condemned."

Upon appeal,[3] however, the Judicial Committee reversed the judgment of Sir Samuel on this point and laid down the principle that it is the duty of the Prize Court, subject to certain exceptions, to preserve the *res* in its custody, for delivery to the parties who may ultimately establish their right to it. Lord Parker adverting to the statement of Sir Samuel regarding the inherent power of the Prize Court as to the realization of

[1] The *Proton*, VII Lloyd 208; I Br. & Col. Pr. Cas. 107. Compare also the *San Jose*, X Lloyd 429.
[2] IV Lloyd 1; I Br. & Col. Pr. Cas. 320.
[3] IV, *ibid.*, 62; II, *ibid.*, at p. 19.

property in its custody, pending the decision as to who was entitled to it, said:

"It cannot, in their Lordships' opinion, be held that the Court has any inherent power as laid down by the President in this case. The primary duty of the Prize Court—as indeed of all courts having the custody of property the subject of litigation—is to preserve the *res* for delivery to the persons who ultimately establish their title. The inherent power of the Court as to sale or realization is confined to cases where this cannot be done, either because the *res* is perishable in its nature or because there is some other circumstance which renders its preservation impossible or difficult. In such cases it is in the interest of all parties to the litigation that it should be sold or realized, and the Court will not allow the interests of the real owner to be prejudiced by any perverse opposition on the part of a rival claimant. Such a limited power would not justify the Court in directing a sale of the *res* merely because it thought fit so to do or merely because one of the parties desired the sale or claimed a right to become the purchaser." [1]

Sec. 65. Jurisdiction When the Prize Is No Longer in Existence. Sequestration Equivalent to Capture. In the two Italian cases [2] mentioned in a preceding section, both vessels had already been destroyed at the time the proceedings were instituted. Both were Greek vessels which had been sequestrated by the Italian authorities, one being afterwards sunk by the Austro-Hungarian naval authorities in the port of Durazzo, the other having been sunk in consequence of striking a mine. The owners contested the jurisdiction of the Prize Commission, first on the ground that the object of prize proceedings being ships or goods and not persons, a Prize Court could exercise no jurisdiction when the object no longer existed in fact. The contention was also made that the jurisdiction of a prize tribunal is limited to captures and since there had been no capture here but only an act of sequestration there was no jurisdiction in the Prize Commission to hear the cases. The Prize Commission rejected both exceptions as not being well-founded.

The first exception, it declared, was based on a principle of criminal procedure which was not applicable to proceedings in prize; in the latter procedure an action could not be considered

[1] See also the case of the *Oregon, No. 1* (II Br. & Col. Pr. Cas. 348), where the Prize Court of British Columbia said: "Quite apart from any statute or rule this Court has jurisdiction to take all necessary steps to preserve any property which is in its custody, and its jurisdiction begins not merely when the ship is delivered to the marshal, but from the moment of seizure. See the *Zamora*, wherein it is stated that 'the primary duty of the Prize Court . . . is to preserve the *res* for delivery to the persons who ultimately establish their title.'"

[2] The *Mikail* and the *Anthippi*, Sec. 36 *supra*.

as extinguished by the impossibility of achieving the end sought, namely the confiscation of the ship.

"The action of the state certainly has this end in view, but as a consequence of a decision that the capture was legal and as a recognition of the fact of acquisition already made, the acquisition on the part of the state has not taken place in effect in consequence of a derivative but an original title because its case does not rest upon the right to the property captured but solely in the power of the belligerent state exercised in accordance with legal rules. But since the exercise of this power has taken the form of capture, the title of acquisition arises at this moment and the decision which pronounces its validity, whether its most exact definition, establishes solely an accomplished fact and produces, in consequence, from the moment of capture, a change of ownership. This notion of the decision upon the question of legality, accepted substantially by the most accredited doctrine, leads necessarily to an affirmation of the power of the Prize Commission to pronounce judgment even after the destruction of the prize."

In support of this view the Prize Commission cited the decision of the Japanese Prize Court of May 16, 1905, in the case of the *Romulus* where a ship which had already been sunk was declared to be good prize. In no case, it was added, could the interest of the state in obtaining a decision establishing the legality of a capture be contested; in consequence the Prize Commission could not be without jurisdiction to pronounce judgment upon the question, by reason of the fact that the prize was no longer in existence.

As to the second exception raised to the jurisdiction of the Commission, namely that there had been no capture but simply an act of sequestration, the Prize Commission admitted that the Merchant Marine Code and the decrees of 1915 distinguished between "capture" and "sequestration," the latter applying only to enemy and not neutral ships, such as the two vessels in question were. But the distinction was not clear or fundamental, either according to Italian legislation or the international conventions. In fact, in different articles of the Declaration of London the two acts were regarded as synonymous and in the rules of International Maritime Law published in Italy in 1908 sequestration had been effectively considered conformably to the rest of the terminology adopted by the other nations, as a procedural formality precedent to capture and even as identical with "capture." In reality, it was said, the long discussions which took place at the naval conference did not lead to any sure distinction, since, as was affirmed by M. Renault, it was simply established that the word "sequestre" was employed even in cases

where there existed no intention to "capture" the ship. In the present case the commander of the port who employed the word "sequestre" later declared in his note of December 20, 1915, to the Minister of Marine that he had intended to speak of "capture" in the sense of Article 3 of the decree of the Lieutenancy of July 4, 1915. The conclusion of the commission therefore was that there had been a veritable act of "capture" and not a "sequestration" and consequently the Prize Commission had jurisdiction to determine whether it was a legal capture.

In various other cases the Italian Prize Commission took jurisdiction and declared to be good prize sequestrated enemy ships which had already been sunk months before steps looking to their formal capture had been taken.[1]

VI

Jurisdiction of Prize Court Over Vessels Interned in Neutral Ports

Sec. 66. Belgian Jurisprudence. In the cases of the *Elbing, Hanau* and *Tasmania* and the *Atto* and *Ganelon*[2] the Belgian Prize Council asserted jurisdiction over and condemned certain German ships which at the time were not in the custody of the Council but were interned in neutral waters (Dutch). These were German vessels which with more than thirty others had been seized by the Belgian authorities in the ports of Antwerp and Ghent immediately after the outbreak of the war in August, 1914. Prize proceedings were instituted against one of these (the *Gneisenau*) and a judgment of condemnation was pronounced on Sept. 16, 1914. In the meantime Antwerp was occupied by the Germans, the ships were recaptured and further proceedings by the Belgian Prize Council were suspended. The Dutch government had refused a proposal of the British government to allow the ships to be taken down the Scheldt, on the ground that it would involve a violation of the neutrality of the Netherlands and it later notified the German government that

[1] See, among others, the *Eugenia* (ex *Lombarda*), Fauchille et Baslevant, *Jurispr. Ital.*, 471. Compare in this connection the distinction which was sought to be made by counsel before the Chinese Prize Court between "capture" and "taking into custody." The *Albenga*, Judgments of the High Prize Court, at p. 28.

[2] 47 *Rev. de Droit Int. et de Lég. Comparée* (1920), 227 ff.; texts in English, *Brit. Yr. Bk. of Int. Law*, 1921-22, pp. 183 ff.

the same rule would be applied if the Germans should request permission to take the vessels through the Scheldt.[1]

A few days before the conclusion of the armistice (November 11, 1918) when the retirement of the Germans from Belgium was imminent, the German authorities, notwithstanding the Dutch warning, sent all the ships down the Scheldt, where they were interned by the Dutch authorities. Proceedings for the condemnation of the vessels were now resumed by the Belgian Prize Council. The owners contested the jurisdiction of the Prize Council on the ground that the ships were no longer within the possession of the captor or in the custody of the Prize Council. The Council however distinguished between "legal possession" and "physical custody" and maintained that actual physical possession was not essential to establish the jurisdiction of the prize tribunal. It referred to Article 23 of the XII Hague Convention which provides that a prize may be taken into a neutral port to await adjudication, as a recognition of the principle that the jurisdiction of a Prize Court extends to vessels held as prize in neutral ports. It was further asserted by the Prize Council that the act of recapture by the Germans was incomplete because of the Dutch prohibition upon the removal by way of the Scheldt of the ships from Belgian jurisdiction; on the other hand, it argued that the Belgian capture was from the outset complete and definitive. It was also suggested that the removal of the ships by Germany immediately before the signing of the armistice was an attempt to defeat the purpose of the armistice; consequently the recapture and removal of the ships was of doubtful legality and did not affect the validity of the original Belgian capture.

Sec. 67. Belgian Doctrine Contested. The validity of the judgments of condemnation in these cases was contested by the allied powers after the conclusion of the armistice, on the ground that the Belgian Prize Council was without jurisdiction to pronounce their confiscation. The controversy was settled, however, at Spa in July, 1920, by an agreement under which Belgium while still maintaining that the condemnation of the ships by the prize tribunal was legal, consented, in consideration of a certain allotment of tonnage to her, to relinquish her claim to the vessels condemned.[2]

[1] See the Dutch *Livre Orange* of April, 1918, pp. 26 ff., and Brit. *Parl. Papers Misc.*, No. 12 (1918), Part II, Nos. 1-8.

[2] Text of the agreement in 16 *Amer. Jour. of Int. Law*, Off. Docs., pp. 197 ff.

The claim of the Belgian Prize Council to jurisdiction in these cases has been both denied and defended by high authority. Professor Pearce Higgins contends that the distinction which the Prize Council made between "legal" and "physical" possession for the purpose of establishing the jurisdiction of the Prize Council was not well-founded; that when a possessor is deprived against his will of physical possession by another who has control of the *corpus,* with the intention of holding it for himself, he loses possession and with it all his possessory remedies; that as regards the reliance upon Article 23 of the XII Hague Convention the Dutch government not having embodied it in its neutrality regulations could not subsequently invoke it; besides these were not cases in which prizes had been taken into Dutch waters by the Belgian captors to await adjudication but prizes which had been removed there by the Germans in whose possession they were actually at the time; and that the argument of the Belgian Prize Council based on the incompleteness of the German recapture because of the legal incapacity of the Germans to remove the ships, would apply equally to the original capture by the Belgians.[1]

Professor De Visscher, an eminent Belgian jurist, on the contrary, defends the decisions of the Prize Council.[2] His conclusion is that the presence of the ships in neutral waters had no effect upon the rights of any of the parties involved; that their rights had to be determined exactly as if the ships were in Belgian waters at the close of hostilities; that their final disposition depended solely upon the consequences of acts of material appropriation of which they had been the object on the part of the belligerents, and that the capture of an enemy ship is accomplished only from the moment at which the captor state has placed it beyond the immediate danger of recapture.

Professor De Visscher referred to the case of the *Polka*[3] in which Dr. Lushington during the Crimean War condemned a prize which at the time was lying in a neutral port (Prussia) for the reason that it could not without danger of loss be taken into a British port[4] and he cited Phillimore and other English

[1] See his note in the *Brit. Yr. Bk. of Int. Law,* 1921-22, pp. 180 ff. Verzijl (*op. cit.,* p. 1304) agrees with Professor Higgins that the Allies were right in contesting the validity of the Belgian decisions. So does Colombos, *op. cit.,* p. 43.

[2] 47 *Rev. de Droit Int. et de Lég. Comparée* (1920), pp. 228 ff.

[3] 2 Spinks 57.

[4] Professor Higgins, however, points out that in this case the Prussian government consented to the taking of the prize into one of its ports to be held there pending adjudication and that Dr. Lushington expressly stated in

and American authorities for the view that while the condemnation of a prize in a neutral port may be "irregular it is nevertheless clearly valid." [1]

Sec. 68. The Same. Case of the "Appam." [2] Professor De Visscher in his defense of the claim asserted by the Belgian Prize Council to exercise jurisdiction over German ships interned in Dutch waters, referred to the case of the *Appam* as another and more recent instance in which a Prize Court claimed and exercised jurisdiction over a prize while it was lying in a neutral port. The *Appam* was an English merchantman which had been captured by a German warship and taken into Newport News, Virginia, where the German government claimed the right to bring and hold it in pursuance of the treaty of 1799 (renewed in 1828) between the United States and Prussia. Upon its being libelled in the United States District Court at Norfolk by the original British owners for the purpose of obtaining its restitution, the German government protested on the ground that the American court was without jurisdiction to entertain the suit and that it being a case of prize the German Prize Court alone was competent to deal with the vessel. The German ambassador in a note to the American Secretary of State adverting to the terms of the treaty of 1799 which provided among other things that prizes should not be "put under legal process where they come to and enter the ports of the other party" added: "besides, the *Appam* flies the naval flag of and belongs to the German government, and therefore the possession of the captors in a neutral port is the possession of their sovereign. The sovereign whose officers have captured the vessel as a prize of war remains in possession of that vessel and has full power over her. The neutral sovereign or its court can take no cognizance of the question of prize or no prize and cannot wrest from the possession of the captor a prize of war brought into its ports." [3] The German contention was evidently based on the assumption that German title to the prize had already been acquired by the

his judgment that the circumstances being entirely special, the case must not be considered as a precedent for the condemnation of a prize brought into a neutral port. "The rule is," said Dr. Lushington, "that the prize shall be brought into a port belonging to the captor's country, and the Court must guard itself against allowing a precedent to the contrary to be established." See also the observations of Dr. J. B. Scott, 10 *Amer. Jour. of Int. Law* (1916), p. 829.

[1] Phillimore, *International Law*, Vol. III, Sec. CCCLXXII.

[2] For further discussion of this case see Secs. 14, 24 *supra*, and Sec. 173 *infra*.

[3] Text in Spec. Supp. to 10 *Amer. Jour. of Int. Law* (1916), p. 391.

mere fact of capture and without a decision of the Prize Court of the captor's country. It also apparently proceeded on the theory that the action in the American court was in effect a proceeding in prize; in fact, it was not such, but a proceeding in admiralty to determine not the question of the legality of the capture but whether the German captor had a right under the treaty with the United States and under the general principles of international law, to bring the prize into an American port and to deposit it there as spoils of war.

Sec. 69. View of the American Supreme Court. The District Court held that the German captor had no such right and that the Court in the exercise of its admiralty jurisdiction was competent to hear the claim of the British owners and to order the restitution of the vessel to them, and this was accordingly done. The judgment of the District Court was affirmed, upon appeal, by the Supreme Court.[1]

The Court apparently considered that title to the prize did not pass to the captor by the mere fact of capture, as the Germans claimed, and could not pass until the legality of the capture had been affirmed by the decision of a Prize Court of the captor's country and that such a decision could not be legally taken by a German Prize Court while the prize was lying in a neutral port.

In the meantime, nevertheless, Prize Court proceedings for the condemnation of the vessel had been instituted in the German Prize Court and on May 11, 1916, the Imperial Prize Court at Hamburg rendered a decision condemning the *Appam* as a good and lawful prize.[2] The Prize Court evidently assumed that it had rightful jurisdiction to pronounce the condemnation of the prize although it was lying in a neutral port and did not discuss at all the question of jurisdiction.

This decision was rendered nearly a year before the decision of the United States Supreme Court, but the fact that the German Prize Court had taken jurisdiction and condemned the ship did not deter the United States court from proceeding with the case. On the contrary, it expressly denied that the German Prize Court had exclusive jurisdiction, and as stated above, the American court apparently did not recognize that the German Prize Court could lawfully exercise jurisdiction at all to condemn

[1] 243 U. S. 124. Text of the decision also in 11 *Amer. Jour. of Int. Law* (1917), pp. 443 ff.

[2] English text of the decision in 11 *Amer. Jour. of Int. Law* (1917), p. 872.

a prize lying in a neutral port.[1] As to the first mentioned point the Supreme Court said: "Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port and under our practice was within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment."

The decision of the Supreme Court has been generally approved by American authorities[2] but naturally German writers disapprove it.[3]

[1] Compare the observations of Dr. J. B. Scott, 10, *ibid.*, pp. 826, 829.

[2] See, among others, Scott's article cited and Coudert, *The Appam Case*, 11 *Amer. Jour.* 302.

[3] See an article entitled *The Case of the Appam and the Law of Nations*, by Dr. Arthur Burchard, 11, *ibid.*, p. 270, who argues that the United States courts had no lawful jurisdiction of the case because there was no breach of neutrality; that the decision as to restitution involved passing on the legality of the capture; that the determination of this question belonged only to the Prize Court of the captor's country and that the British claimants were bound to await the decision of the German Prize Court and in case they were dissatisfied with it, to leave it to their government to present their claims through the diplomatic channel to the German government.

CHAPTER III

PRIZE COURT PROCEDURE

I

Sources of Rules of Procedure

Sec. 70. English Rules. Unlike the substantive law of prize, that is, the law which defines the causes for which belligerents may capture, destroy, detain or confiscate ships and cargoes of the enemy or of neutrals, the law of the procedure of the Prize Courts has been, in large measure, codified. It is found in special laws enacted by the legislature or in decrees or ordinances issued by the chief of state in pursuance of his inherent prerogative or as a result of authority conferred upon him by legislative delegation. In Great Britain the matter is dealt with, in part, by the "Naval Prize Act, 1864," the "Prize Courts Act, 1894," the "Prize Courts (procedure) Act, 1914," amending the Act of 1864, the "Imperial Prize Courts Act, 1915" and the "Prize Court Rules, 1914," amended by Orders in Council in September and November, 1914, and in February, March and April, 1915.[1] The Prize Court rules of 1914 embrace 289 rules with appendices containing forms and tables of fees and costs.[2] They were made by the King in Council in virtue of authority

[1] Lord Parker observed in the case of the *Südmark* (III Br. & Col. Pr. Cas. 77) that the procedure of prize courts "has always been recognized as a matter of municipal as opposed to international law." In the *Zamora* (IV Lloyd at p. 50) Sir Samuel Evans remarked that "matters of practice in proceedings . . . are not of international concern; and are not, and cannot be, regulated by uniform international principles or procedure to be applied in the courts of all countries." In the case of the *Corsican Prince* (I, *ibid.*, p. 186), Sir Samuel observed that "the Prize Court Rules have been framed for this Court and have been made under the Prize Court Act, 1894, and not by the Rule Committee which frames the rules for the High Court.

[2] Texts of these acts and of the Prize Court Rules of 1914 may be conveniently found in Tiverton, *The Principles and Practice of Prize Law* (London, 1914), Appendices I, II & III, and in the supplement thereto. In 1908 Prize Court Rules codifying the old practice of the High Court of Admiralty in prizes and containing some additions were promulgated in accordance with the provisions of the Naval Prize Act of 1894, but they were never in force in time of war and were superseded by the Prize Court Rules of 1914.

conferred by the Prize Court Act of 1894. Lord Parker pointed out in the case of the *Zamora* that the Prize Court rules, so far as they relate to procedure and practice have, therefore, statutory force and it is from the statute and not from the executive that they derive their validity.[1] As such they are binding upon the Prize Court. But an order issued by the Crown in Council may deal with other matters than rules of procedure or practice; its prescriptions can only be regarded as rules of procedure when they prescribe the course to be followed by the judge; if the effect is not merely to give directions but to alter the substantive law administered by the Prize Court it is not binding upon the Court since the Court "must deal judicially with all questions which come before it for determination and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings." [2]

In the case of the *Kim and other vessels* the contention was put forward by the claimants that the Order in Council of October 29, 1914, modifying Article 36 of the Declaration of London relative to continuous voyage, introduced not merely a new rule of procedure but a modification of the substantive law and as such was not binding upon the Prize Court. Sir Samuel Evans admitted that if the Order had affected the substantive rights of neutrals it would not be binding upon the Prize Court; but, in his opinion, it had no such effect, its purpose being merely to alter the practice as to evidence and methods of proof by adding certain presumptions contained in Article 34 of the Declaration of London. It was not therefore in violation of any rule or principle of international law. In the case of the *Zamora* Sir Samuel stated that matters of procedure and practice were "a domestic affair, in which no foreign neutral or enemy has any voice or right to interfere." If his Lordship meant to affirm that the substantive rights of claimants are not affected by rules of procedure and evidence his view cannot be accepted.[3]

Order 45 of the Prize Court Rules of 1914 declares that in all cases not provided for by the rules "the practice of the late High Court of Admiralty of England in prize proceedings shall be followed, or such other practice as the president [of the Prize Court] may direct." In pursuance of this order Sir Samuel Evans

[1] See also the observations of Sir Samuel Evans in the same case (IV Lloyd at p. 50) to the effect that the Prize Court Rules have the force of an Act of Parliament, since they are made "under statutory powers."
[2] Lord Parker in the *Zamora* (*ibid.*, at p. 89).
[3] Compare Pyke, 32 *Law Quar. Review*, 64, 166.

said in the case of the *Möwe*[1] he thought the Court had "the inherent power of regulating and prescribing its own practice, unless fettered by enactment" and he added that "Lord Stowell from time to time made rules of practice and his power to do so was not questioned."

Sec. 71. German and Austrian Rules. The rules of procedure of the German Prize Courts are found in the *Prisengerichtsordnung* of April 15, 1911, promulgated on August 3, 1914, along with the prize code (*Prisenordnung*) of September 30, 1909, and amended in certain particulars by ordinances of August 3, 1914, and March 26, 1915.[2] Both the prize code and the code of prize procedure were promulgated by the Emperor in pursuance of authority conferred by Articles 1 and 2 of the law of May 3, 1884, on the subject of prize law. The Austro-Hungarian rules of prize procedure are contained in the *Prisengerichtsordnung* of November 28, 1914, accompanying the prize code (*Dienstbuch* XXI-1a).[3]

Sec. 72. French Rules. The French rules of procedure are found in a long series of decrees, *arrêtés règlements*, and ordinances, some of which date from the latter part of the seventeenth century. The more important of these are the marine ordinance of August, 1681, the *règlement* of July 26, 1778, the decrees of May 9, 1859, and November 28, 1861, the *règlement* of June 4, 1859, reënacted August 22, 1914, and the naval "instructions" of 1912 (revised in 1916).[4]

Sec. 73. Rules of Other Countries. The principal rules of procedure for the Italian Prize Commission are found in the Merchant Marine Code of 1877, in the decree of the *Luogotenenziale* of May 30, 1915, constituting the Prize Commission[5] the "regulatory dispositions" of September 13, 1915,[6] and the rules relative to the exercise of the right of capture approved by decree March 25, 1917.[7]

The rules of Chinese Prize Court procedure are found in the

[1] I Br. & Col. Pr. Cas. 71; II Lloyd 70.

[2] Huberich & King, *The German Prize Code*, p. xv. Text in *Reichsgesetzblatt*, 1914, p. 301. For the amendments see *ibid.*, 1914, p. 314, and *ibid.*, 1915, p. 193. A brief summary of German prize procedure may be found in Berthon, *Juridiction des Prises Maritimes* (1910), pp. 49-51.

[3] Annex to the *Dienstrèglement für die K. u. K. Kriegsmarine* of May 2, 1913.

[4] See the complete list in Verzijl, *op. cit.*, pp. 1360 ff. Texts in *Decisions du Conseil des Prises* (1916), pp. 1-5. Brief summary of French procedure in Berthon, *op. cit.*, 64 ff., and in Vigère, *La Juridiction des Prises Maritimes* (1901), Sec. III.

[5] Text in Fauchille et Basdevant, *Jurispr. Ital.*, Annexe, p. v.

[6] *Ibid.*, p. xxiv. [7] *Ibid.*, p. xlv.

"Prize Court Rules," the "Detailed Rules of the High Prize Court" and the "Regulations Governing Capture at Sea" all promulgated in 1917, following China's entrance into the war.[1]

Some Japanese rules are found in an imperial decree of August 20, 1894, relative to the Prize Court (modified in 1904, 1905, 1914 and 1915) and an imperial decree of October 6, 1914, containing prescriptions concerning the conduct of the war on sea.[2]

The rules of Prize Court procedure of other countries in which Prize Courts sat during the late war are found in part in the Russian prize regulations of 1895, the Turkish decree of Jan. 31, 1912, the Belgian organic law of 1919 relative to the constitution of the Prize Council, the Roumanian decree of September 18, 1917, on the organization, jurisdiction, and functioning of the Prize Courts, the Greek law of March 29, 1913, on the establishment of a Prize Court, the Siamese decree of 1917 and the Portuguese decree of August 14, 1916.[3]

II

Initiation of Proceedings

Sec. 74. Duty to Bring Prizes In. Ordinarily prize proceedings are not instituted against a ship or cargo until they have been brought into port and put into the custody of the Prize Court. "The goods when seized," said Lord Parker in the *Louisiana*,[4] "must, of course, be brought into the Prize Court for adjudication." In the case of the *Südmark* [5] his Lordship, adverting again to this essential condition, added that it was

[1] Texts in Cheng, *Judgments of the High Prize Court of the Republic of China*, Appendix, pp. 125 ff. The Chinese Supreme Prize Court is authorized by Article 35 of the Prize Court Rules to issue "detailed" rules of procedure. Since China had no Prize Court Rules when the war broke out, it was contended by the claimants of enemy vessels seized in Chinese ports at the outbreak of the war that the rules could not be applied by the Prize Court to captures made prior to the promulgation of the rules for the reason that it would be *ex post facto* legislation. But this contention was rejected. See the case of the *Albenga*, *Judgments of the High Prize Court*, p. 41.

[2] Texts of the various decrees in force during the World War are published in the Japanese language in a volume entitled "Laws and Regulations of Maritime War." The decree of 1894 authorizes the Supreme Prize Court to make rules governing its own procedure.

[3] Summaries of the rules of prize procedure in all the above-mentioned countries may be found in the treatises of Berthon, *op. cit.*, Cr. III and Vigère, *op. cit.*, Sec. III. As to Germany and Austria, particularly, see Huberich, "Development of German Prize Law," 18 *Columbia Law Review*, pp. 512 ff., and "Austro-Hungarian Prize Courts," 59 *Solicitors' Journal and Weekly Reporter*, 438.

[4] V Lloyd 248; III Br. & Col. Pr. Cas. 61.

[5] VI, *ibid.*, 343; *ibid.*, 75. As to the duty of captors see also Tiverton, *op. cit.*, pp. 20 ff.

the duty of the captors to bring the ship in to a convenient port without breaking the bulk and to preserve the property in order that it might be dealt with as the Prize Court might determine. While the duty of bringing the ship in, he added, is generally discharged by the captors, it makes no difference to the owners by whom it is done. As a matter of practice, he said, it was quite common for the captors, under the orders of their superior officer, to hand the prize over to some other officer of the Crown to be taken into a convenient port. The convenience of the port to which a prize is brought in for adjudication, he continued, must be determined by all the circumstances of the case. Other things being equal, the nearest available port should be preferred. Thus a ship captured in the English channel ought not, as a rule, to be taken to Gibraltar, because it would be unreasonable to subject her to the risk of so long a voyage. As between various home ports it would be quite proper to select the least congested port or the port the voyage to which, although longer, would involve the least danger from the risks incident to war. A convenient port must be one in which the property can remain in safety without being exposed to special risk from wind or tide. The real point to be considered, he said, was the safety of the prize, the distance of the place where the Prize Court is sitting being immaterial.

As to the proper officer in whose custody a prize should be placed, international law, he said, makes no provision. Inasmuch as the duty of the Crown to preserve the captured property exists as well after as before the ship is brought in, the matter is of little importance to the owners and may be reasonably determined by the municipal law of the captor state.[1] In Germany, he observed, prizes were handed over to the port authorities; in Great Britain they were required by the Naval Prize Act of 1864 to be delivered to the marshal of the Court; if there were no marshal, then to the principal customs officer of the port; and if there were no such officer then to a person appointed as detaining officer of prizes.[2]

[1] Ordinarily a British Prize Court will not exercise jurisdiction over captured property or the proceeds therefrom unless it is at the time in the custody of the marshal of the Court. But an exception is made in case the prize is an enemy warship. Prize Court Rules, 1914, Order X, Rule 9. See also the case of the *Emden* (X Lloyd 52, Sec. 60 *supra*), where in pursuance of this rule the Prize Court condemned a German warship which had never been placed in the custody of the marshal but which at the time of condemnation remained in the hands of the naval authorities.

[2] As to the duty of captors and the responsibility of the Crown for loss or damage to the goods while in its custody, see Sec. 77 *infra*.

If the prize is destroyed at sea, as many of those taken by the German and Austrian naval forces in fact were, naturally it cannot be taken in. In that case the ship's papers should be taken in and placed in the custody of the Prize Court, but in fact this was frequently not done by German and Austrian naval commanders.

Sec. 75. Preliminary Inquiry. The institution of prize proceedings is usually preceded by a preliminary examination conducted by a special commissioner or agent, ordinarily other than the judges themselves, for the purpose of determining whether the facts justify the captor government in asking the Court for a decree of condemnation. The results of the inquiry may be such as to cause the government to release the ship or goods without trial.[1] This enquiry in Germany was made by *Prisenämter* in the ports to which the prize is brought; in Austria-Hungary by a *Prise Untersuchungskommission;*[2] in France and Italy by a marine officer of the port; in Greece, Roumania and Japan by a "judge-reporter" and in China,[3] Russia and Turkey by a judge of the Prize Court itself.[4]

Sec. 76. Forms of Action. Normally the proceedings take the form of an action *in rem* brought by a representative of the captor state against the ship or cargo, or both, for the purpose of obtaining a decree of condemnation or detention. Under the British procedure the proceedings may also be instituted against the freight, against other goods than the cargo or against the proceeds from the sale of the ship, cargo, or other goods. The pro-

[1] In some cases, however, the consent of the Prize Court is necessary to release. Thus in the case of the *Birkenfels and Cargo* (*Cases Decided in the Prize Courts of South Africa*, p. 40), we read: "Such cargo as the Lords of the Admiralty decide not to proceed against may be released and an application shall be subsequently made to this Court to sanction such release. . . . Releases will be granted where the claims are submitted when the same are entitled to be released." The Italian rules of March 25, 1917 (Art. 104), provide that the government may before or after judgment of the Prize Commission release a ship or cargo or a part thereof. See also the case of the *Adriaticos* (Fauchille et Basdevant, *Jurispr. Ital.*, 375), where the Prize Commission held that the government might for political reasons order the release of a prize when the case was pending before the Prize Commission and even after a decree of confiscation had already been pronounced.

[2] As to the preliminary proceedings in the German and Austro-Hungarian prize courts see Huberich, 18 *Columbia Law Review* 512 ff., and 59 *Solicitors' Journal & Weekly Reporter*, p. 438.

[3] In China one of the judges of the district Prize Court was designated to make a personal inspection of the ship and to report to the court thereon. Prize Court Rules, Art. 13. See in this connection the case of the *Albenga*, *No. 4, Judgments of the High Prize Court of the Republic of China*, p. 36.

[4] As to the nature of the preliminary examination see Berthou, *op. cit.*, pp. 64 ff.; Vigière, *op. cit.*, pp. 164 ff.; De Boeck, *op. cit.*, 378; and Fauchille, *Droit Int. Pub.* (II., Sec. 1437).

ceedings may also take the form of an action *in personam* brought by a plaintiff against the owners of the ship or the cargo, as defendants.[1] Such are actions for damages, for the recovery of freight and other similar claims. Such also would be the claim of a neutral government for an indemnity on account of an alleged violation of its neutrality by a warship in the exercise of the right of capture,[2] the claim of the owners of innocent goods against a ship suspected of unneutral service,[3] a suit by the owners of a ship against the owners of the cargo for freight or *vice versa*,[4] etc. In all such cases the controversy is not one between the captor and the claimant and the action is not therefore for condemnation, but it is a controversy between the captor state and a neutral power or between interested parties other than the captor and the claimant.

Since the obligation is, in theory at least, upon the captor state to establish to the satisfaction of the Prize Court the validity of the capture the proceedings are generally initiated by a petition, citation or summons emanating from a representative of the captor state, although it may happen that other interested parties may likewise take the initiative, in default of action by the captor state, or in case the action is not for condemnation but is a claim for damages, freight, etc.

The British Prize Court rules, 1914 (Order II) require that every case in prize shall be instituted by a "writ," [5] that every case for condemnation of a ship (with certain exceptions) shall be instituted in the name of the Crown but that with the consent of the Crown the proceedings may be conducted by the captors or any parties to whom the ship would on condemnation be condemned as prize; and that all other cases may be instituted

[1] Prize Court Rules, 1914, Order II, App. A, form No. 1, p. 40.

[2] See, for example, the cases of the *Düsseldorf* and the *Pellworm and other vessels*, discussed in Secs. 167, 169, 484-485 *infra*.

[3] For example, the *Chrysopolis* (Fauchille et Basdevant, *Jurispr. Ital.*, 162).

[4] For example, the *Iolo* (I. Br. & Col. Pr. Cas. 291).

[5] As to the initiation of proceedings in the British Prize Court see Tiverton, *op. cit.*, pp. 28 ff.; in the Prize Courts of other countries see Vigière, *op. cit.*, pp. 171 ff.; Berthon, *op. cit.*, pp. 64 ff. In the case of the *Proton* (II Br. & Col. Pr. Cas. 107) the Prize Court for Egypt held that a release granted in the case of a captured ship, before the issue of a writ did not have the force of a restitution judicially recorded and did not bar the subsequent seizure of the ship as prize. The release in this case was addressed to the marshal, was issued in the name of the King, attested in that of the judge and signed by the registrar. The claimant contended that this document operated as a bar to further proceedings against the ship and the judge thought it would have had this effect had a cause actually been instituted as required by the rules, but as no writ had been issued when consent for the release was given, he thought it had no such effect.

in the name of the claimant parties. The writ is issued by the registrar of the Court upon application of the proper Crown officers and if it is a writ for condemnation it can be issued only after the filing of an affidavit as to the ship's papers. The writ is served by the marshal of the Court or by his substitute, and by leave of the Court it may be served out of the jurisdiction and upon an alien enemy. Any person desiring to enter an appearance must do so within 8 days after the service of the writ, although by leave of the Court he may do so at any time before the final adjudication (Order III). In case no action is instituted aginst the ship within one month after its seizure and it is still detained, the claimant may apply for an order for its release and restoration (Order V).

Sec. 77. Officer Bringing the Action. In all countries there is an official known as the "procurator," "procurator-general" or "commissioner," who initiates the action, in case it is a suit for condemnation. In Great Britain the Procurator-General appears to have a large discretion as to what action he shall take.[1] He may ask for an order of detention or of condemnation; he may ask that the goods be sold or he may decide to release the ship or goods upon such conditions as he may propose, without prize proceedings against them, or he may postpone proceedings until he has procured evidence which in his opinion is sufficient to lead to condemnation.[2] In case the captured ship has been destroyed or been lost, the affidavit together with the ship's papers must be filed within three days after the institution of the proceedings (Order IV). In case the Procurator-General is guilty of bad faith in detaining the goods and of instituting proceedings when the evidence was such that the Court would have released them, damages will be awarded against the Crown. But if there are strong grounds of suspicion and the Procurator-General acts in good faith believing that the evidence is sufficient to justify condemnation there are no grounds for damages because of his continued prosecution of a claim which he has rightfully made. This principle was laid down by Sir

[1] In the case of the *Zamora* (IV Lloyd at p. 111), Lord Parker observed that: "Under the old practice the captors were parties to every proceeding for condemnation, and damages and costs could in a proper case have been awarded as against them. But every action for condemnation is now instituted by the Procurator-General on behalf of the Crown, and the captors are not necessarily parties."

But where there is unnecessary delay or failure in prosecuting proceedings for condemnation the claimants are entitled to have their property released." The *Birkenfels, Cases Decided in the So. Afr. Prize Court*, p. 36.

[2] As to the power of the Crown to release prizes before and after adjudication see the case of the *Leda* (III Br. & Col. Pr. Cas., p. 505).

Henry Duke in the case of the *Falk and Other Vessels* [1] and it was approved by the Judicial Committee. Here the Procurator-General had delayed bringing the case to trial while he was collecting evidence, four years having elapsed between the seizure and the judgment releasing the goods, in consequence of which the appellants suffered a "large and regrettable loss." Regarding the liability of The Procurator-General for the delay, Lord Sumner said:

"The liability of the Procurator-General, if any, has been rightly presented under two heads: the first, liability for the original seizure; the second, liability in respect of the course taken in the legal proceedings. Somewhat different considerations no doubt arise in the two cases. The original seizure takes place before the particular circumstances have been inquired into; the suit is prosecuted after materials have been collected and time has been allowed for their examination. The element of mere suspicion, so prominent when first the prize is brought in, diminishes as investigation proceeds and proof takes its place. The prospect of the discovery of substantial evidence is one that can be weighed by those in charge of the case for the Crown. It follows in their Lordships' opinion that a point must ultimately be reached, at which, without purporting to act as a judge, the Procurator-General should decide for himself whether to go on or not. This obligation is all the more important because of the change of practice, necessitated by changed circumstances, which authorizes the collection of material at large and its presentation by both sides instead of deciding the question of release or detention, in the first instance, only on evidence coming from the ship."

And he added:

"Under these circumstances their Lordships are of opinion that they cannot question the President's conclusion as to the existence of sufficient grounds for the detention. Although in the long run condemnation could not be hoped for, still, when the goods were placed in prize there was probable cause for a judicial inquiry with a view to their condemnation. It is not a case like the *Ostsee,* where the detention, though honestly made, was made on a ground which in fact had no existence. Nor is it such a case as is there mentioned as possible of a seizure . . . where not only is the ship in no fault, but she is not by any act of her own open to any fair ground of suspicion.

"In such cases (and the proposition applies equally to goods) the belligerent may seize at his peril and take the chance of something appearing on investigation to justify the capture, but failure is visited with the liability to pay damages and costs.

"As to the second part of their case, the appellants claim damages for the action or the inaction of the Procurator-General after they had disclosed their documents to him and had satisfied his requisitions. They say that it then became his duty to obtain the prompt and effective release of the

[1] X Lloyd 25, 38. See also Sec. 466 *infra.*

cargo, and, if necessary, to apply for and to procure a license to export it. They even aver, as a ground for claiming all damages consequent upon the detention of the goods, that if the prohibition so stood in the way of the fullest benefit being derived from a decree of release, the Prize Court was bound to restore the position in their favour by requiring the Procurator-General to pay compensation, because another, and the appropriate, department had failed to exercise its discretion in the manner desired.

"Their Lordships think that, in principle, these contentions fail. The greater the mass of transactions to be inquired into, the more astute the schemes of contraband traders, the more enlarged the available sources of information and the means of making it subserve the discovery of truth, the more is it necessary that the Procurator-General should have all proper opportunity of preparing the case for submission to the Court, free from the insistent pressure of a liability in damages and costs, so long as he has not been guilty of delay for indirect objects or from mere neglect, and has materials which are proper to be examined judicially. It is not suggested against the Procurator-General that he protracted the proceedings in bad faith or maliciously, or in fact at all. His good faith is indeed conspicuous throughout. When he offered a settlement, the claimants, under advice, entertained it without protest and shortly accepted it. They reserved their existing claims, but they made no allegation of any fresh ground of complaint. The Procurator-General is not a judge; neither to the Crown, to the Court nor to the claimants does he owe any duty to decide questions which are for the Court, nor is he entitled to proceed only when he has a personal conviction upon the question in suit. His duty is to act reasonably. Even where the paucity of the evidence in reply, would lead the Procurator-General, as a reasonable man, to abandon any further attempt to obtain a condemnation, there is no authority for saying that the ship or cargo will be detained thereafter at his expense in damages, and that the application for release is merely a protective step for him to take in self-defence. It is equally a step which the claimant can take, and ought to take to mitigate his damages. . . . Instead of applying for a license themselves, as they were free to do, the appellants preferred to sell the goods to the War Office and to take their chance of obtaining damages on some ground at the trial.

"A passage in the judgment of Sir Samuel Evans in the *Kronprins Gustaf Adolf* is relied on as laying down a rule that the Procurator-General must within a reasonable time after getting full information into his hands decide whether he has a case for condemnation or not, so that if he has none he may apply for the release of the *res*, and that, if he fails to do so, he proceeds or delays to discontinue at his personal risk as to damages. The point does not seem to have been argued; the proposition intended to be laid down is by no means clearly expressed, and it has been doubted whether anything more was intended than to give interest in the particular case to mitigate exceptional hardship: see the *Hallingdal*.[1] . . .

"It may be that there are cases so plain that to keep them up is patently unreasonable, and some mulct, probably in costs, should be the consequence of undue tenacity. Deliberate procrastination or a scheme for delay would of course be a wholly different matter. Where, however, there is a real question of law, a conflict of testimony, or a genuine doubt as to

[1] Sec. 490 *infra*.

the inference to be drawn from ascertained facts, the Procurator-General is not to be visited with costs or damages, merely on the ground that he submits it to the judgment of the Court, instead of taking the decision into his own hands. He is entitled to have genuine doubts cleared up by the claimant to the satisfaction of the Court."

III

Right of Appearance

Sec. 78. Right of Enemy Subjects to Appear. British Practice. Notwithstanding the rigor of the ancient rule of law under which enemy subjects were generally excluded from bringing actions in the courts there was a noticeable relaxation from the severity of the old practice in all the belligerent countries during the late war, particularly in respect to the admission of enemy claimants to appear in the Prize Courts. The British Prize Court Rules of 1914 apparently assumed that enemy subjects would be admitted to appear as parties since reference was made to writs issued "on application of an alien enemy" (Order II, 22) and it was provided that "an alien enemy shall, before entering an appearance, file in the registry an affidavit stating the grounds of his claim" (Order III, 5).

In the case of the *Chile*,[1] the first to be heard by the British Prize Court, the writ was addressed to the German owners and parties interested in the ship, commanding them to cause an appearance to be entered for them, and in pursuance thereof, the owners appeared. Their counsel argued that under Article 23 of the 4th Hague Convention of 1907, and by the principles of "natural justice" they were entitled to appear. Furthermore, they pointed out that the Prize Court Rules of 1914 contemplated the appearance of enemy owners and the decision in the *Fenix*[2] was cited as authority for the view that an alien enemy could appear to show that his property was protected from capture, by an Order in Council or by the law of nations. In the course of the argument Sir Samuel Evans interjected the remark that if the owners of the ship were subjects of the German Empire they had no right to appear and argue a question of international law, and in support of his view he quoted from the opinion of Sir William Scott in the case of the *Hoop*.[3] The affidavit required

[1] I Lloyd 8; I Br. & Col. Pr. Cas. 1.
[2] Spinks, 1 (1854); 2 Eng. P. C. 238.
[3] 1 C. Rob. 196, 201; 1 Eng. P. C. 104, 107.

by the rules to be filed, being found to be "wholly insufficient" because it did not show who were the owners or by what right they claimed to appear, Sir Samuel struck out the appearance and left undecided the question whether if the affidavit had been regular, they would have had a right to appear and be heard. Shortly thereafter the question was again raised in the case of the *Marie Glaeser*,[1] a German-owned vessel seized in an English port at the outbreak of the war. An appearance was entered "at the request of a gentleman who said he acted as agent for the owners of the vessel." As in the case of the *Chile* the affidavit was found to be "wholly insufficient" because it failed to show or indicate any circumstances which entitled the enemy owner to appear in the Prize Court. Sir Samuel added that the requirements of the Prize Court Rules that the affidavit must state the grounds of the claim, did not mean merely a statement of the claimant's contentions but a statement of facts which in the special circumstances entitled him to enter an appearance. Sir Samuel quoted from the decision of Dr. Lushington in the case of the *Panaja Drapaniotisa* (1856)[2] to the effect that it was incumbent upon a claimant to show that he was entitled to a *locus standi*. While the form of the affidavits in use at that time was no longer employed, they ought, he said, to state clearly what was the position of the owner of the vessel, what his nationality was, and, in case he were an alien enemy, the circumstances showing the grounds of his claim to a *locus standi* for the purpose of being heard, ought to be stated. This not having been done the appearance was struck out, as in the case of the *Chile* and no decision was pronounced on the question of the right of appearance.

The question was definitely disposed of by Sir Samuel Evans in the case of the *Möwe*[3] decided in October, 1914, and the decision was in favor of the enemy claimant. The owner was a German subject and while the affidavit was "not very aptly drawn to set forth a claim," Sir Samuel said he would assume that it "sufficiently disclosed the special circumstances in which the contention was put forward." He reviewed at length the opinion and practice of the past in respect to the admission of

[1] I Lloyd 56; I Br. & Col. Pr. Cas. 38.
[2] Spinks 336; 2 Eng. P. C. 560 (1856).
[3] II Lloyd 70; I Br. & Col. Pr. Cas. 60. In the case of the *Oregon* (No. 2), (II Br. & Col. Pr. Cas. 350), the Prize Court of Victoria, British Columbia, emphasized the necessity of an alien enemy claimant filing before appearance an affidavit, stating the ground of his claim, as a condition precedent to his being heard.

enemy aliens to appear in the Prize Courts. Adverting to the reliance of counsel upon various decisions of the Japanese Prize Court during the Russo-Japanese war he said that upon examination it would be found that they all dealt with claims either of neutrals or of claimants whose contention was that their property was entirely immune from capture and from condemnation. All these cases, he pointed out, were prior to the Hague Convention of 1907. He continued:

"Under the Hague Convention No. VI the attitude which the owner in the present case must take may shortly be stated in these terms: 'I admit I am an alien enemy; and therefore that my ship was lawfully captured, or seized, as being enemy property; but I wish to appear to put forward and argue my claim that in the circumstances of my case the ship is not confiscable, and cannot be condemned; but can only be detained during the war, to be restored to me after the war.'

"Applying the principles laid down by Lord Stowell and Dr. Lushington, I am satisfied that in their day they would not have allowed the enemy owner to appear to assert such a claim. There is no coming *pro hac vice* within the King's peace; there is no suspension of the hostile character. As to what those eminent judges would have done if they lived in the present day I will not hazard a conjecture."

He then concluded:

"Having premised so much, I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under the Hague Conventions, assuming, as was done during the argument, that they are operative. Under some of the Conventions some degree of protection and relief is given in respect of vessels which are not wholly immune from capture at sea or seizure in ports; for example, under the sixth Convention the consequences of seizure or capture are minimised and limited in certain cases, although complete immunity is not afforded. Under others of the Conventions some vessels are entirely exempted from capture.

. . . "Dealing with the Hague Conventions as a whole, the Court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise. Mr. Holland argued that this is a matter not of International Law, but of the practice of this Court. That view is correct. I think that this Court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned. Moreover, by Order XLV of the Prize Court Rules, 1914, it is laid down that 'In all cases not provided for by these Rules, the practice of the late High Court of Admiralty in England in prize proceedings shall be followed, or such other practice as the President may direct.' The Rules do not provide for the case now arising. I therefore assume that as President of this Court I can

give directions as to the practice in such cases as that with which the Court is now dealing.

"The practice should conform to sound ideas of what is fair and just. When a sea of passions rises and rages as a natural result of such a calamitous series of wars as the present, it behoves a court of justice to preserve a calm and equable attitude in all controversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects. In times of peace the admiralty courts of this realm are appealed to by people of all nationalities who engage in commerce upon the sea, with a confidence that right will be done. So in the unhappy and dire times of war the Court of Prize as a court of justice will, it is hoped, shew that it holds evenly the scales between friend, neutral, and foe.

"A merchant who is a citizen of an enemy country would not unnaturally expect that when the State to which he belongs, and other States with which it may unhappily be at war, have bound themselves by formal and solemn Conventions dealing with a state of war, like those formulated at The Hague in 1907, he should have the benefit of the provisions of such international compacts. He might equally naturally expect that he would be heard, in cases where his property or interests were affected, as to the effect and results of such compacts upon his individual position. It is to be remembered also that, in the international commerce of our day, the ramifications of the shipping business are manifold, and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security if, through an owner (though he be an enemy), the case for a seized or captured vessel were permitted to be independently placed before the Court.

"For the considerations to which I have adverted, and in order to induce and justify a conviction of fairness, as well as to promote just and right decisions, I deem it fitting, pursuant to powers which I think the Court possesses, to direct that the practice of the Court shall be that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court. The grounds of his claim should be stated in the affidavit to lead to appearance which is required to be filed by Order III, Rule 5 of the Prize Court Rules, 1914."

While the decision was in effect an announcement by the Prize Court that enemy claimants would be allowed to appear and be heard, the concession was limited to those who claimed rights or immunities under international conventions and the learned president made it clear that it was a favor or act of grace and not a *right* that was being recognized.[1]

[1] In the case of the *Bawean* (III Br. & Col. Pr. Cas. 439), Lord Sterndale stated that an enemy owner of goods might appear and defend his rights under the Declaration of Paris. Sir Erle Richards (*Brit. Yr. Bk. of Int. Law*, 1920-21, p. 14), adverting to the nature of the concession thus made, says, "It is to be regretted that the Prize Courts of this country have not as yet accepted the full results of this international position, inasmuch as they do not allow enemy subjects to appear before them in every case.

In the same month the South African Prize Court reached the same conclusion in the *Hamm* (No. 5) and the *Apolda* (No. 6),[1] before the decision of Sir Samuel Evans in the *Möwe* was known to the South African court. In these cases Judge Juta said:

"It is perfectly true that under the ordinary rules of Prize Courts an enemy is not, as a general rule, entitled to be heard, but there are exceptions, and it is surely within the province of His Majesty to waive any right he may have to refuse to allow the enemy to appear in one of his courts, and, if the Crown waives that right, then it certainly gives a right to the enemy to be heard.

"Under the Hague Convention the Crown has made it one of the elements that a ship, if ignorant, could not be condemned. I cannot see how it is possible for that fact to be brought out in a court of justice without hearing the person who is supposed to have the knowledge. I cannot see how the Crown can very well prove that a ship which enters a harbour had knowledge or had not knowledge; the question of the onus of proof is a question that will arise hereafter, but it is an element in the case, and if it is an element and no condemnation can take place until that fact has been decided, then the Crown must be deemed to have waived its right and permitted the enemy to come into court in order to give evidence upon this point. In the case of the *Marie Glaeser* the Court did not specifically rule that the enemy was not allowed to appear upon the ground that clauses 1 and 2 of the Hague Convention might be binding and that clause 3 was not binding. Clause 3 which was the clause in point, in the case of the *Chile,* clearly was not part of the treaty and was not binding upon His Majesty. Consequently no enemy could plead that by clause 3 of the treaty made by His Majesty the refusal to allow him to be heard in a court of law had been waived; but in this particular case, where the Court is dealing only with clauses 1 and 2, I think that under the circumstances, and upon the admission made by the proctor, without deciding that these clauses were binding, we ought to allow the captain, who appears on behalf of the owners, to be heard."

It will be seen that the judge here based his decision on the fact that the Crown had renounced certain of its strict rights by

Clearly, if they are to be courts to decide cases in which enemy subjects are concerned according to the law of nations, those subjects ought to be entitled as of right to appear and defend their interests. But the practice has been to the contrary in the past. In the present war the Prize Court has allowed enemy subjects to appear to claim specific protection granted by treaty, but not to appear in other cases. There can be little reason for the maintenance of this restriction. If alien enemies can appear to claim the benefit of exemption conferred on them by the Hague Convention, then surely they should be allowed to appear to claim exemption conferred on them by the common law of nations. The broad question does not seem to have been argued directly, but the courts have proceeded on the assumption that the right of audience was limited in the manner described. German Prize Courts take a more liberal view and allow enemy subjects to appear before them; and this, as is thought, is the only view consistent with the international status of Prize Courts." See also the criticism of Colombos, *op. cit.*, p. 310.

[1] *Cases Decided in the Prize Courts of South Africa*, p. 15.

agreeing by Order in Council to be bound by the Hague Conventions which conferred upon the enemy certain rights and brought him within the recognized exceptions to the old rule relative to the *locus standi* of enemy aliens.

Sec. 79. The Same (Continued). A few weeks later the Prize Court for Egypt in the *Gutenfels*[1] followed the decision of Sir Samuel Evans, to which the Court referred with approval. Adverting to the contention of the Procurator-General that while an enemy owner ought to be admitted to appear and be heard because the Crown had announced its willingness to be bound by the Hague Conventions and to allow the enemy any advantage to which he was entitled thereunder, it was not within the power of the Court to admit any general relaxation from the old established rule against the right of enemy aliens to sue in British courts, Judge Cator said:

"I cannot accede to this contention. I take the same view as the President of the English court. I consider that the rule is one of practice which it is open to the Court to vary, not indeed capriciously, but for good cause. And I think that it is not the right but the duty of the Court so to alter its practice from time to time as to reflect the changing conditions of civilisation that it has to serve. Now there can be no doubt that the general attitude of mind and conditions of thought of civilised mankind has greatly altered during the last hundred years, and an endeavour has been made to formulate this changed opinion in the various international conventions that have been signed at Berne, the Hague, and elsewhere and it is just and right that the milder views of the present generation should find an echo in the procedure of our prize courts.

"In my opinion, the rule that forbids an alien enemy to appear on behalf of his ship or cargo is a barbarous rule which runs counter to all sense of natural justice. It is strange to find it embedded in the practice of any English court. The rule, if I mistake not, did not exist in earlier times. It is said that Sir Leoline Jenkins, a seventeenth-century judge who left a traditionary reputation for wisdom and enlightenment, considered that it was inequitable to condemn an enemy's ship without hearing what the owner might have to say in defense of his property.

"If it is right that we should insist upon hearing a man in his own defence in those courts where the parties are of one nation, and the judge may be expected to be quite indifferent as to which suitor should succeed, it seems to me to be still more important that the enemy party should be heard in a Prize Court when the Crown claims condemnation of his ship and the judge's sympathies must be supposed to be in favour of his own country.

"It is much to be regretted that this question did not occupy the attention of the Hague Conference. I have little doubt what the opinion of the Conference would have been, and feel sure that most of the delegates would have been surprised that in a British Prize Court the owner of cap-

[1] I Br. & Col. Pr. Cas. 102.

tured property has no right to present his case against the Crown if he be an alien enemy. There are not wanting writers on international law who complain of the rule. For instance, Mr. Ernest Nys, a distinguished Belgian legist, mentions it as one which in ancient times was universal, but says that at the present day 'two countries,' and I understand him to mean two alone, 'Great Britain and the United States, continue to assert its legality, and there even exist writers on jurisprudence who defend this out of date policy.'"—*Le Droit International,* par Ernest Nys, 1906, vol. iii., p. 150.

"The fact is that the rule is a bad rule, much more to be honoured in the breach than in the observance; and if we must acknowledge ourselves to be so far fettered by the dead hand of outworn precedent as to recognise its continued existence, I am, at any rate, determined to permit all such breaches of it as my sense of equity and fair dealing towards the enemy may demand. For the present it is enough to say that we have decided to allow an enemy to raise any defence founded upon the Hague Conventions, as has been done in the English Prize Court, and to extend that indulgence to any enemy who bases his claim upon the terms of any Conventions relating to the Suez Canal, or upon the special relations in which Egypt stands to the British Government."

The commercial court for Malta, in prize, in the case of the *Erymanthos* [1] likewise followed the decision of Sir Samuel Evans, although the language employed by the Court was reserved and cautious. Thus the Court observed:

"The Prize Court Rules foresee the possibility of an appearance and claim being entered by an alien enemy, and subject such appearance to the filing of an affidavit. I understand the Rules to mean that the affidavit must shew that by an international agreement the alien enemy, who could not otherwise be heard, is entitled to appear and to ask for redress against the action of the Crown. In the affidavit of the *Deutsche Levante Linie* such international agreement was invoked, and therefore the alien enemy must be heard within the limits of such agreement. The alien enemy could not be heard to discuss general principles of international law or to criticise the proceedings, but must be heard with regard to any relief to which he may be entitled under the international agreement, which in itself is a license from the Crown to appear and defend and maintain any right under such agreement. I now understand that the President of the Prize Court in England has, under similar circumstances, allowed an alien enemy to be heard. I might have made the order at that sitting, but having heard that a similar question was being discussed in England I postponed making the order out of due deference to the High Court in England. At that sitting, as I was bound to do, I asked the learned counsel to discuss whether I could make the appearance, subject to security for costs. . . .

"Instructions will be given to the registrar to note in the minute book that the order made by the President on November 9, 1914, by which he 'directed that the practice of the Court should be that when an alien enemy thought that he was entitled to protection under the Hague Convention

[1] I Br. & Col. Pr. Cas. 339.

of 1907, he should be permitted to appear in Court as a claimant and argue his claim,' is made a rule of the Malta Commercial Court in Prize, subject to such order for costs as the judge may deem fit to make."

The Judicial Committee recognized without discussion the correctness of the view adopted by the Prize Courts.[1] In other countries enemy claimants were admitted equally with nationals or neutrals to appear before the Prize Courts and be heard through counsel and this without regard to whether they asserted rights under the Hague and other international conventions or not.[2]

Sec. 80. Non-Owners, No *Locus Standi*. In the case of the *Emil*[3] the question was presented to the Prize Court for Egypt as to whether a British mortgagee of a captured enemy vessel was entitled to a *locus standi* in the Prize Court to argue against the condemnation of the ship when the enemy mortgagor or owner himself did not appear. Adopting the affirmative view, Judge Cator said:

"I think upon general principles of equity that in such a case the mortgagee has a sufficient interest in the subject-matter to justify his appearance. It might very well happen that the value of the charge exceeded that of the security, and that the mortgagor might be indifferent whether the ship were confiscated or detained, whereas the mortgagee would have every interest in obtaining an order for detention with a view perhaps to a sale, and deposit of the proceeds in Court as security for his charge. We allow the claimant's appearance and right to appeal against the condemnation of the ship."

But in the case of the *Maracas*[4] where certain American insurers of contraband goods seized on a neutral vessel, who had not paid any losses applied for leave to enter an appearance, Sir Samuel Evans struck out the appearance, for the reason that in

[1] The *Pindos*, the *Helgoland*, the *Rostock* (II Br. & Col. Pr. Cas. 146) and the *Hakan* (II, *ibid.*, 479). In the latter case Lord Parker said: "The cargo owners did not appear or make any claim in the action, although according to the usual practice of the Prize Court even enemies may appear and be heard in defense of their rights under an international agreement" (in this case the Declaration of Paris).

[2] As to Germany see Huberich and King, *The German Prize Code*, p. xvi. The Belgian Organic law of 1919 allows an enemy to appear in person before the Prize Council only with the authorization of the council, but he may be represented by a Belgian advocate. See the case of the *Wartburg* and other vessels, 47 *Rev. de Droit Int.* 131, and *Moniteur Belge*, Dec. 10, 1919. As to the practice of the French Prize Council see, among other cases, the *Czar Nicolai II* (Fauchille, *Jurispr. Franc.*, 10), where the right of the owners of an enemy ship to enter an appearance was admitted. Compare also Colombos, *op. cit.*, p. 312.

[3] I Br. & Col. Pr. Cas. 257.

[4] VI Lloyd 257. Compare also the *Gothland*, V, *ibid.*, 39; II Br. & Col. Pr. Cas. 293.

his view they "could not possibly have any *locus standi* in this Court." In the case of the *Zaanland* and other vessels [1] Sir Samuel said: "if goods claimed have ceased to belong to claimants (in consequence of their having been transferred to the insurers) before they came into court to prove their title as owners their claim must fail."

In the case of the *Vesta* and other vessels [2] where the appellants, a neutral company, had purchased in good faith an enemy cargo on an enemy ship which had taken refuge in a neutral port upon the outbreak of war and transshipped the goods into a neutral vessel, the appellants invoked the non-applicability of the rule relative to the invalidity of transfers of property *in transitu* and also the Declaration of Paris which they argued protected the goods from capture. As to this argument the Judicial Committee observed:

"It appears to have been overlooked that the claimants could only use this argument after their own title to independent rights had been negatived. They never purported to have merely bought the enemy owners' right or chance of escape. They could not claim on behalf of the enemy owners, if the enemy owners could not claim for themselves, and if the enemy owners were competent to claim for themselves, they should have entered an appearance, and have done so. Enemy claimants have been repeatedly recognised, to assert rights under international conventions—for example, the *Möwe,* the *Marie Glaeser*—or to contest condemnation of their goods, if shipped or carried under circumstances which give immunity from capture—the *Roumanian,* the *Hakan.* Their Lordships have already decided that ownership claims on appeal must be made by appellants who come before the Board as owners. It follows that, if this point had arisen for decision, the claimants would have failed upon the preliminary ground that it was not available to them."

In the case of the *Kronprinzessin Cecilie* [3] the Judicial Committee said:

"The first point, however, to be decided is whether the appellants, not being at the time of seizure owners of the goods, have any interest in the goods such as would entitle them to be heard on the appeal. Their Lordships are of opinion that the appellants, not being owners of the goods, have no such interest, and that on this ground alone the appeal must be dismissed. . . . The appellants, having no such interest in the goods as would entitle them to be heard, are in the position of mere outsiders and have no *locus standi* either to criticize the order of the Court below, or to ask that such order should be varied or set aside. In the *Proton* it was held that the claimant was not at the time owner of the vessel and conse-

[1] X Lloyd 343.
[2] X Lloyd 106; III Br. & Col. Pr. Cas. 909.
[3] VIII Lloyd, at p. 134; III Br. & Col. Pr. Cas. 363.

quently could not maintain the appeal. Lord Sumner, in delivering their Lordships' judgment says:

'If the learned Judge's first finding is right this appeal fails, for M. Kouremetis (the appellant) has no character except that of owner in which he can claim to have the ship released to him, and, if not her owner, has no *locus standi* to criticize or complain of her condemnation.'"

In the case of the *Frogner*[1] Lord Sterndale laid it down that the person possessing the property in the goods at the time he comes into court is entitled to assert a claim and it is immaterial that the ownership only passed to him subsequent to the date of seizure. His Lordship said:

"There is, no doubt, a *dictum* of the late learned President, to which I was referred, in *The Hilding*,[2] to the effect that where the property had not passed the claim would be disallowed. I have not had an opportunity of reading through the whole of the facts in that case, nor am I sure that it is not complicated by the question of enemy property. I think there are other *dicta*, or statements, by the late President to the same effect. If these *dicta* be correct, the claimants in this case cannot claim because they had not got the property in the goods at the date of seizure. The persons who would have the property in the goods under these circumstances would be Messrs. Armour & Co., the shippers.

"It seems, so far as I can understand the *Prinz Adalbert* (No. 2),[3] to be quite clearly decided by the Privy Council that if the shipper has the property in the goods at the time of seizure, but he has not got it at the time of adjudication, and at the time of the claim, he cannot claim, and cannot assert his right to the property in the *Prize Court*. I am told that the point has been raised several times, and has not been decided, although there are *dicta* on it, but I think it well to give my judgment at once upon it and leave it to be decided by the Privy Council, if necessary.

"The result of the Crown's contention would be—and I cannot see that it would be a right conclusion—that goods might be brought into this Court, and condemnation asked for, and no ground of condemnation shown. Nobody could claim. The shipper could not claim, according to the authority of the *Prinz Adalbert*, because he had not got the property at the time that he brought his claim before the Court. The consignee could not claim because he had not got the property at the date of seizure. The date of seizure is undoubtedly the date at which the position, or status—if I may call it so—of the goods must be determined; but apart from any question of enemy property, which does not arise in this case, I cannot think that, under any circumstances, goods which are not liable to condemnation at all would be obliged to remain in the hands of the Crown because the shipper, not having the property in them at the date of making the claim, could not claim, nor could the consignee purchaser, because he had not the property in them at the date of seizure. That seems to me to give rise to an impossible position, and forming the best opinion I can upon it, I arrive at the conclusion that the person having the property in the goods at the

[1] VIII Lloyd at p. 392; III Br. & Col. Pr. Cas. 404.
[2] VIII Lloyd 170.
[3] V Lloyd 1.

time he comes into Court to assert his claim to them is the person who is entitled to claim, and that it is not an answer to him to say that the property had passed to him only after the date of seizure. I wish, however, to guard myself by saying that I only arrive at that conclusion apart from such questions as might arise as regards enemy property or possible infection. In the latter case it might very well be said that the goods were infected at the date of seizure, and could not be disinfected by passing the property in them subsequently; but apart from any question of that sort, in a simple case such as this, in my opinion the person having the property at the time of claim is the person entitled to come and assert the claim before this Court. He, of course, must assert it subject to those other questions that I have mentioned, which might arise; but in circumstances like the present I think he is entitled to assert his claim, and therefore I decide that the goods must be released to the claimants in this case."

Sec. 81. The Same. French Jurisprudence. The French Prize Council likewise held that a mortgagee or pledgee of enemy goods and the holder of the bills of lading, by reason of advances made on the cargo, was not qualified to assert a claim before the Council. The decision was affirmed by the Council of State which declared that "a pledgee (*créancier gagiste*), whatever may be his legal situation according to French legislation in relation to the debtor and with third parties, cannot be admitted, in the matter of maritime prize, to avail of this situation as against a belligerent state which has exercised the right of capture, to claim restitution of goods seized or claim their value, this restitution, if such it should be, being authorized only for the benefit of the owner." [1] But it held that a French company which was a creditor of an enemy steamship company had a sufficient interest in a prize proceeding for the condemnation of a ship belonging to the latter company to be entitled to assert a claim before the Prize Council.[2]

On the other hand, it was held that a Swiss insurance company which was the insurer of goods seized as contraband and which asserted that in case the goods were released the company would become the possessor thereof was not entitled to assert a claim before the Prize Council for the reason that it had no right of property in the goods.[3]

The Council of State in the case of the *Kirkoswald* [3] refused to hear the claim of the Swiss *Société de Surveillance Economique*

[1] The *Eir*, Fauchille, *Jurispr. Franc.* 244.
[2] The *Colonia*, *ibid.*, p. 50.
[3] *The Marienbad No. 3*, *Rev. Gén. de Droit Int. Pub.*, 1920, *Jurispr.*, p. 25.
[4] Fauchille, *Jurispr. Franc.*, 441. To the same effect see the decisions of the Council of State in the case of the *Seriphos* (*Rev. Gén.*, 1923, *Jurispr.*, p. 27), where it was held that a neutral owner could not claim restitution of goods unless he was the owner thereof at the date of seizure.

to certain goods consigned to it on an English steamer for the reason that it was not established that the society had ever acquired the property in the goods. The owner alone, the Council added, had "according to a jurisprudence constant" the quality to demand restitution for his benefit, of goods seized by a belligerent state in the exercise of the right of capture.

Sec. 82. The Same. German Jurisprudence. The German Prize Court likewise held that a purchaser of goods who had not become the actual owner had no *locus standi* to assert a claim for damages.[1] Similarly, the German Prize Court held that insurers and sellers who were not the real persons injured or who were not the parties directly interested did not possess the quality to assert a claim (*aktivlegitimation*).[2] And the owners of a ship were not entitled to appear in behalf of those interested in the cargo of the ship; and while the captain by reason of his office, was qualified to do so, he could do it only as the representative of each of the interested parties and in this event he must show that he was their duly constituted agent.[3]

It was also held that the owner of a neutral ship destroyed could not claim an indemnity for the personal effects lost by members of the crew. It was impossible, said the Court, even in private law, to apply the rule by analogy to the relations between the crew and the shipowner.[4]

IV

Evidence and Proof

Sec. 83. Position of Claimant in the Prize Court. In the case of the *Möwe*,[5] Sir Samuel Evans pointed out that "a claimant in a Prize Court is not in a position analogous to that of a defendant, but rather to that of a plaintiff." "In the writ the owners of a vessel," he said, "are not made defendants." And in the case of the *Louisiana and Other Vessels* [6] Lord Parker observed that a neutral trader who comes into the Prize Court "is not in the position of a person charged with a criminal of-

[1] The *Hyades* (I *Entsch.* 180; Fauchille et De Visscher, *Jurispr. All.* 138). See also the *Eskimo* (I, *ibid.*, 382; *ibid.*, 292).
[2] The *Papelera*, I, *ibid.*, 334; *ibid.*, 252.
[3] The *Lupus*, I, *ibid.*, 377; *ibid.*, 288.
[4] The *Trudvang*, I, *ibid.*, 276; *ibid.*, 209.
[5] II Lloyd 70; I Br. & Col. Pr. Cas. at p. 66.
[6] V. *ibid.*, 248; III, *ibid.*, at p. 61.

fense and presumed to be innocent, unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure, or to displace such reasonable suspicion as, in fact, exists." [1] Yet Judge Cator in the case of the *Marquis Bacquehem* [2] remarked that a ship brought before a Prize Court by the Crown might "in some sense be compared to an accused person."

Sec. 84. Burden of Proof Usually on Claimant. It is a rule of practice in Prize Court procedure, though the theory is otherwise, that the burden of proof usually rests upon the claimant to establish his claim. *Prima facie* a capture is regarded as valid and it lies upon the claimant to prove the contrary. This shifting of the burden differentiates prize procedure from ordinary criminal procedure.[3]

In the controversy between the governments of the United States and Great Britain relative to the seizure of American cargoes during the late war, Sir Edward Grey in a note of Feb. 10, 1915, to the American Ambassador thus stated the theory and the practice:[4]

"The principle that the burden of proof should always be imposed upon the captor has usually been admitted as a theory. In practice, however, it has almost been always otherwise, and any student of the Prize Court decisions of the past or even of modern wars will find that goods seldom escape condemnation unless their owner was in a position to prove that their destination was innocent."

In the case of the *Zamora* [5] Sir Samuel Evans said:

"Prize Courts have always acted upon the principle that the capture is lawful, until claimants establish the contrary. All that it is necessary for captors to allege in prize proceedings is that the capture was made, and that the property captured is claimed as prize; thereupon claimants must establish their claim to release."

[1] In the case of the *United States, No. 4* (III Br. & Col. Pr. Cas. 843) the Judicial Committee again declared that a neutral trader is not presumed to be acting innocently unless circumstances justifying the seizure of his goods are proved beyond all doubt and that the burden is on him to show that there was no reasonable suspicion justifying the seizure or to displace the existing suspicion.

[2] I Br. & Col. Pr. Cas. 135. Compare also the *Venizelos* (Prize Court of Malta, July 15, 1915), where it was said that a claimant in a Prize Court must prove the innocent destination of the goods claimed.

[3] De Boeck (*op. cit.*, p. 381), adverting to this "anomalous," not to say "scandalous," rule of Prize Court procedure under which the captor occupies the favored position of defendant and is not required to establish the validity of the capture while the claimant must "prove his innocence," raises his voice in protest against the injustice of the rule.

[4] Supp. to 9 *Amer. Jour. of Int. Law*, p. 78.

[5] IV Lloyd 1; I Br. & Col. Pr. Cas. at p. 320.

In the case of the *Antares*,[1] he said:

"It is the theory of the old Prize Courts, and I think it is a very sound one, that the Crown themselves capture or seize a vessel, and the persons whose property is seized must come here in the course of the proceedings prepared to give grounds why their property is not confiscable. It is enough for the Crown to say, 'We regard this vessel or this cargo as prize and we seize it as prize, and we issue a writ against you in which we tell you that we are going to ask the Court for its condemnation.' Thereupon the other parties must file their claim, and it is for them to shew that the seizure and capture by the Crown were not rightfully made."

In the case of the *Roland*,[2] he said:

"I think it is abundantly clear, according to prize law, that property upon an enemy ship consigned to an enemy port is *prima facie* enemy property, and it is for the claimants, who allege that the property belongs to them, as neutrals, to make out their case, and to make it out clearly. No authority is required for that, though several authorities have been referred to in the course of the arguments. I am content to say that that is, and ought to be, the presumption in cases of this description."

In the case of the *Australia*,[3] decided by the Prize Court of Ceylon, counsel for the controllers of a German firm argued that the above quoted statement of Sir Samuel Evans was inapplicable to the case of a cargo which was not consigned to an *enemy* port, but Judge Renton said he "did not think that Sir Samuel Evans intended to engraft any such limitation upon the principle that he was affirming. On the contrary, he was merely touching upon a circumstance disclosed by the particular facts with which he had at the moment to deal."

Sec. 85. Specific Cases in Illustration. In other cases it was held to be incumbent upon the claimants of goods to establish that they were the owners;[4] that where a ship had been transferred to a neutral flag, the onus was on the transferee to prove "the complete innocence of the transaction"[5]; that in the case of conditional contraband consigned to an agent in a neutral country adjacent to Germany where the imports of such goods greatly exceeded those prior to the war, the onus was upon the claimants to show that the goods were not going to Ger-

[1] II, *ibid.*, 219; I, *ibid.*, 27.
[2] II Lloyd 253; I Br. & Col. Pr. Cas., p. 189.
[3] II Br. & Col. Pr. Cas. 315.
[4] The *Rijn*, VI Lloyd 181; II, *ibid.*, 507.
[5] The *Daksa*, V, *ibid.*, 317; II, *ibid.*, 358. See also, the case of the *Edna*, IX, *ibid.*, 70; III, *ibid.*, 407. To the same effect see the German case of the *Cubano*, I *Entsch.* 203.

many;[1] that the onus of proving ignorance of hostilities on the part of the master of a ship entering a British port after the outbreak of the war, in order to be entitled to the benefit of the 6th Hague Convention, was incumbent upon the master;[2] that it was incumbent upon a claimant who alleged that he was not an enemy subject to prove that he had taken steps to divest himself of his enemy commercial domicile;[3] that where goods had been shipped under such circumstances as to be liable to forfeiture for trading with the enemy the burden of proof was on the claimant to establish that subsequent events had relieved the goods from such liability;[4] that neutral claimants who alleged that the ship claimed had been transferred to them must prove the fact of transfer;[5] that even where an enemy ship sailed before the war for a neutral port the onus of proving innocent destination was on the claimant of the cargo;[6] that where an exporter shipped goods, conditional contraband, to a Dutch port under such conditions that he did not retain control over their disposal after their arrival at the port of delivery, it was incumbent upon him to prove that they were not destined for an enemy government or an enemy base of supply;[7] that where goods were laden on an enemy ship the onus was on the claimant to prove that they were not enemy goods;[8] and that where contraband goods were consigned to Switzerland to other consignees than the government, the onus was on the claimant to prove an innocent destination.[9]

In some cases, however, the burden of proof was on the Crown. Thus in the case of a neutral vessel which was proceeding to an enemy port for the purpose of taking away refugees the onus was held to be on the Crown which asked for condemnation, to prove that the ship was engaged in unneutral service.[10] So in the case of goods on an enemy ship, where a non-enemy subject held the bills of lading, the burden of proof was on the captor to establish that they were enemy goods.[11]

[1] The *Urna*, IX Lloyd 104; and the *United States* (part cargo ex), X, *ibid.*, 61.
[2] The *Birkenfels, Decs. of the So. Afr. Prize Court*, p. 40.
[3] The *Kara Deniz*, X Lloyd 355; III Br. & Col. Pr. Cas. 1070.
[4] The *Panariellos*, IV, *ibid.*, 306; II, *ibid.*, 47.
[5] The *Kankakee*, VIII Lloyd 74.
[6] The *Birkenfels* (*re Cargo*), So. Afr. Cases 33.
[7] The *Norne and other vessels*, IX, *ibid.*, 402; III, *ibid.*, 977.
[8] The *Moravia* (Ital.), Fauchille et Basdevant; *Jurispr. Ital.* 35; and the *Porto* (French), Fauchille, *Jurispr. Franc.* 137.
[9] The *Venizelos* (*supra*, Prize Court of Malta).
[10] The *Hanametal* (I Br. & Col. Pr. Cas. 347). See Secs. 447, 450 *infra*.
[11] The *Ambra* (Ital.), *Jurispr. Ital.* 73.

On the other hand it was held that the captor was not bound to prove the knowledge of the shipowner of the presence of contraband on his vessel when the facts warranted inferences that the latter knew that it was carrying contraband, or that if he did not know it, it was because he did not want to know.[1]

Concealment by the claimant of material facts or his negligence in giving satisfactory explanations or in putting forward unsatisfactory or contradictory evidence were held to justify the Prize Court in drawing inferences adverse to his claim. Thus in the case of the *Louisiana* and other vessels[2] the Judicial Committee speaking of the position of a neutral trader before the Prize Court as a claimant, said:

"He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure, or to displace such reasonable suspicion, as, in fact, exists. The State of the captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points. If his goods had no such destination as would subject them to condemnation by the Prize Court, it is his interest to make full disclosure of all the details of the transaction. Only if his goods have such destination can it be his interest to conceal anything or leave anything unexplained. If he does conceal matters which it is material for the Court to know, or if he neglect to explain matters which he is or ought to be in a position to explain, or if he puts forward unsatisfactory or contradictory evidence in matters the details of which must be within his knowledge, he cannot complain if the Court draws inferences adverse to his claim and condemns the goods in question."

In the case of the *United States* (*No. 4*)[3] the Judicial Committee reaffirmed this statement of the rule and overruled Sir Henry Duke for the reason that in their opinion the learned president had not in reaching his conclusion releasing the vessel acted in accordance with the principles thus laid down by the Judicial Committee.[4]

Sec. 86. Admission of Extrinsic Evidence. An important change in British Prize Court procedure, introduced by the Prize Court rules of 1914 was the abolition of the old rule that captors

[1] The *Zamora* (No. 2), VIII Lloyd 347; III Br. & Col. Pr. Cas. 919. See also the case of the *Hilleröd*, V Lloyd 327.

[2] V Lloyd 248; III Br. & Co. Pr. Cas. at p. 61. See in this connection the remarks of Sir Samuel Evans in the case of the *Alfred Nobel and other vessels* (VIII Lloyd at p. 34) regarding the duty of claimants to put forward their cases honestly and as to the penalty that will be visited upon them for false statements and the suppression of material facts.

[3] X, *ibid.*, 65; III, *ibid.*, at p. 850.

[4] Further discussion of the subject of burden of proof in connection with hostile destination in respect to contraband will be found in Secs. 330-331 and 396 *infra.*

must prove their case from the ship's papers and from the "standing interrogatories" [1] and the substitution of a new rule permitting with the consent of the Court the introduction at the first hearing of extrinsic evidence, oral or documentary, which might be material to the issue.[2] Evidence of this kind consisting of cable messages, letters, radio dispatches, and the like, was frequently admitted in contraband cases and upon it condemnations were often obtained by the Crown where under the old procedure it would not have been possible. Neutral governments protested against the new procedure and English jurists themselves were not lacking who criticized it as unjustifiable; but under modern conditions it would seem to be necessary if the real facts especially regarding contraband transactions are to be brought out.[3]

Sec. 87. Rules Regarding Admission of Evidence. Regarding the admissibility of evidence, Sir Samuel Evans said in reply to an objection to the admission of certain letters concerning the transactions between shippers in America and consignees in Denmark:

[1] As to the character and forms of the "standing interrogatories" in the sixteenth century see the *Steamship Palm Branch* (VI Lloyd at pp. 14-15).

[2] Prize Court Rules, 1914, Order XV (e). As to the old procedure see De Boeck, *op. cit.*, p. 384, and Baty and Morgan, *War, Its Conduct and Legal Results*, pp. 363 ff. Evarts' brief in the *Springbok* case, pp. 17 ff.; Baty, "Neglected Fundamentals of Prize Law," 30 *Yale Law Journal* (1920-21), pp. 30 ff., and Briggs, "Doctrine of Continuous Voyage," pp. 152 ff. Sir Erle Richards, referring to the broad interpretation adopted by the Prize Court in admitting extrinsic evidence, said (*Br. Yr. Bk. of Int. Law*, 1920-21, p. 23): "Evidence has been admitted as a matter of course which would have been shut out according to the law which governs proceedings in municipal courts, with the result that the claimant in a Prize Court has suffered the further disadvantage of being placed in a less favorable position in regard to evidence produced against him than a litigant in any other court. This on the face of it appears to be a hardship, and not the less so because claimants are commonly resident in a foreign country and their opportunities of communication with their legal advisers in the territory in which the Prize Court sits are both difficult and infrequent, at least to judge by the experience of this war. It is idle, of course, to expect that neutral claimants should attend before any belligerent Prize Court in which a claim is to be heard in which they are interested, for that would be unreasonable and in many cases impracticable. These changes of procedure may in some cases or in some courts work injustice, and there is weight in the neutral complaints against detention on suspicion; but, on the whole, they seem to the present writer to be an improvement on the old system because they enable the real facts to be brought out. There is no reason why the dice should be loaded in favour of claimants by the restriction of evidence in the first instance to the ships' papers and the standing interrogatories. Nor is it possible to insist on the best evidence alone being given on every point because the presence of witnesses or the production of original documents cannot be always procured in the country of trial. The answer to the complaint of possible hardship to absent claimants is that it must be left to the presiding judge to see that no injustice is caused to them, and that experience has shown that this safeguard can be made effective."

[3] I have discussed the matter of extrinsic evidence in more detail in Secs. 397 ff.

"But it must be remembered that Prize Courts are not governed or limited by the strict rules of evidence, which bind, and sometimes unduly fetter, our municipal courts. Such strict evidence would often be very difficult to obtain, and to require it in many cases would be to defeat the legitimate rights of belligerents. Prize Courts have always deemed it right to recognize well-known facts which have come to light in other cases or as matters of public reputation."[1]

Again in the case of the *Berlin*[2] Sir Samuel adverting to the absence of "direct legal evidence" said:

"But fortunately, in this Court, I am entitled to act upon other evidence or reliable information, and to draw inferences therefrom, upon which the Court may think it safe and just to act. Eminent Judges (among them Lord Russell of Killowen) have commented upon the strict technicalities of some of the rules of evidence in our courts of law; and admirable and wholesome as they are in the main, it would appear that some of them tend to shut out facts which might with advantage to the course of justice be made known to the Court. However this may be, the Prize Court is not bound by such confining fetters as our municipal courts. Upon this subject Dr. Lushington laid down the practice as follows:

"'With regard to the evidence to be produced in the admiralty courts with respect to blockades, and indeed I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered; and certainly we have in this case the license of evidence of every kind and description which could be well offered to the consideration of the Court. I apprehend that this, so far as I know, the universal practice of the Court was adopted for several reasons. First, because the Prize Court being, not a municipal court, but a court for the administration of public law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law. Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence; because this Court, having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding in transactions in which they were interested, proofs recognised by themselves. Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries. Fourthly, because, though the Court may receive all, it will form its own judgment according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence, merely because it does not exclude it.' The *Franciska* (1855), (Spings, 111, 137; 2 Eng. P.C. 346, 394)."

In the case of the *Edna*[3] Lord Sumner stated that "it has long been assumed as good law that captors can rely at the trial on facts unknown to them at the time of capture."

[1] The *Kim*, III Lloyd 167; I Br. & Col. Pr. Cas. at p. 458.
[2] II, *ibid.*, 43; I, *ibid.*, at p. 32.
[3] IX, *ibid.*, 70; III, *ibid.*, at p. 940.

The English Privy Council, unlike the German and French prize tribunals of appeal, does not recognize the right of the Prize Court to admit evidence alleged to have been discovered subsequent to the hearing in the Prize Court below. But in the case of the *Kim (No. 3) and other vessels* [1] their Lordships made an exception in view of the special circumstances and allowed certain documents to be produced and admitted, which were in existence and had been submitted for examination to the Procurator-General before the date of the trial, so that he had an opportunity to offer criticism. They were in the court during the whole of the trial but were not put in evidence because of a mistake as to the date at which the case would be called. In these circumstances their Lordships thought it was in the interest of justice that the documents should be produced and admitted, no such objection existing here as in the case where evidence is discovered subsequent to the hearing in the Prize Court.

Sec. 88. Rules of Criminal Procedure Not Applicable in Prize Proceedings. The German Supreme Prize Court in the case of the *Davanger* [2] emphasized the difference between the procedure of a prize tribunal and that of a criminal court. It said:

"Where sec. 55 of the code of prize procedure prescribes the application to depositions of witnesses and experts (in a measure of no concern here) of the rules of the code of criminal procedure, this does not mean that in prize procedure one must apply all the provisions of this code relative to the admission of evidence. Prize procedure is so different in its essence from criminal procedure that the legislator certainly could not have intended to transport into the former all the rules of the latter concerning the administration of proof. This is why in the code of prize procedure the legislator has limited himself to relatively few prescriptions which lay down in broad outline the rules to be followed. Moreover, the Prize Court itself has full liberty to fix the procedure which it wishes to follow. Thus the Court may, for example, instead of hearing witnesses and experts, accept written depositions, which is not permissible in criminal procedure. Consequently when Sec. 55 of the code of prize procedure refers to the rules of the code of criminal procedure relative to the hearing of witnesses, it means simply that the general depositions concerning the administration of proof by the hearing of witnesses, and especially the form of the interrogatory, the capacity to make oath, the obligation to depose, etc., must find a corresponding application. It does not mean that all the precautions which surround an accused person must be given to a claimant in prize procedure. Therefore there was no vice of procedure [in the lower Court] in admitting the deposition of the captain of the ship (relative to the circumstances in which the *Davanger* was sunk and especially as regards the lack of a ship's certificate)."

[1] X Lloyd 195.
[2] I *Entsch.* 232; Fauchille et De Visscher, *Jurispr. All.*, 178.

Sec. 89. Further Proof. Under the old prize procedure of the English courts it was the practice to consider at the "first hearing" only the evidence contained in the ship's papers and documents and such as was obtained from the "standing interrogatories" addressed to the officers and seamen. Additional evidence was not admitted except upon an order of the court for "further proof" and this only after the case had been fully heard upon the evidence already at hand or where the evidence furnished a ground for prosecuting further enquiry.[1] This was also the procedure of the American Prize Courts. The American Secretary of State during the late war complained that this practice was modified by the British government by the Order in Council of August 5, 1914, so that there was no longer a "first hearing" on the evidence from the ship's papers and the Prize Court was no longer precluded from admitting extrinsic evidence for which no suggestion had been laid in the preparatory evidence.[2] In reply to this complaint the British foreign office stated that some years earlier the government had recognized that "modern conditions had rendered the old rules obsolete and new rules had been prepared under the guidance of the late Lord Gorell, whose experience as president of the Admiralty Division of the High Court of Justice rendered him well qualified to deal with the subject." And it was added that "twenty months experience and the working of the new rules in the Prize Court has seemed to show the utility of the changes." It was further observed that the practice and procedure of Prize Courts were not settled or regulated by international law but were determined by each nation for itself, and the fact that the old British practice had long been observed by both the Prize Courts of Great Britain and the United States (though not by the Prize Courts of any continental country) did not prevent Great Britain from introducing such changes of procedure as modern conditions might

[1] In the celebrated *Memorandum* prepared by Lord Mansfield, Dr. Lee and others in 1753 it was stated that if there did not appear from the ship's papers sufficient ground to condemn goods going to the enemy they must be released, unless it appeared so doubtful from the evidence that it was reasonable "to go into further proof thereof." See also the case of the *Romeo* (6 C. Rob. 35), (1806), where Sir William Scott held that the Court might, when the primary evidence was insufficient, order "further proof," in its discretion. See also the discussion of the matter by Dr. Lushington in the *Alice and Fanny* (Spinks, 322), (1856); Baty and Morgan, *War, Its Conduct and Legal Results*, p. 367; Baty article cited above and Briggs, "The Doctrine of Continuous Voyage," pp. 152 ff. But it always belonged to the Prize Court in its discretion to decline to order further proof.

[2] The Secretary of State to Ambassador Page, Oct. 21, 1915. Spec. Supp. to 10 *Amer. Jour. of Int. Law*, p. 76.

require.[1] Under the new rules therefore any evidence, either by affidavit of witnesses given *viva voce* or documentary, which is material to the issue is admissible.[2]

It is of course within the discretion of The Court to allow or refuse an application on the part of claimants for further proof, and, if it is allowed, to determine whether the captor shall be permitted to file counter evidence. Thus in the case of the *Leda* [3] where an order for further proof was made to permit the claimants to establish that they were the beneficial owners of the vessel, we read:

"The Court declined to order further proof on the ground that whether this ship, built in Germany, with a German register, registered in the name of a German company, carrying on business in Germany, with German ship papers, commanded by a German master, manned for the most part by Germans, flying the German flag, could be considered anything else but a German ship, even if the entire stock of such a German company belonged to individuals or to a company of a neutral State."

In the case of the *Edna* [4] the Judicial Committee adverting to the fact that orders for further proof were much less common in earlier times than today, said:

"It is true that it was not the practice to exercise that discretion in favour of such an order under the circumstances prevailing in the wars at the end of the eighteenth and beginning of the nineteenth centuries. The

[1] British Memorandum of April, 1915, *ibid.*, p. 125. The new rule is found in Order XV of the Prize Court Rules of 1914 which provides that a cause for condemnation shall be heard upon the affidavit and the ship's papers, if any, or upon the affidavits of the officers of the ship making the capture, upon the depositions of the witnesses, if any, and upon "such other evidence, if any, as may be admitted by the judge." The Judicial Committee in the case of the *Ophelia* (II Br. & Col. Pr. Cas. at p. 172) pointed out that the abolition of the preliminary hearing sometimes resulted in prejudice to the Crown and operated to the benefit of the claimant. On this point Sir Arthur Channell said:

"In considering these authorities, it is necessary to recollect that the procedure in the Prize Court has been very substantially altered by the new rules abolishing the preliminary hearing. The alterations in modes of doing business in modern times may have made this preliminary hearing not quite so useful as it was formerly, and some modification of procedure may have been desirable; but the total abolition of a preliminary hearing seems to their Lordships, as has been remarked during the argument of this and other cases before this Board recently, to operate occasionally against the interests of the Crown. Certainly the procedure in the present case has given an advantage to the claimant which he would not have had under the old procedure."

[2] See Roscoe, "Prize Court Procedure," *Brit. Yr. Book of Int. Law*, 1921-22, p. 94, who defends the new procedure as "clearly in consonance with the general trend of change throughout the whole English law" and in accordance with modern conditions. Compare also the opinion of Sir Erle Richards, quoted above (Sec. 86), and Colombos, *op. cit.*, p. 314.

[3] I Br. & Col. Pr. Cas. 238.

[4] III, *ibid.*, at p. 942.

likelihood of further evidence of value being obtainable was so small, in proportion to the delay that it would involve, as to disincline the Court to allow a more remote investigation than the examination of the ship's papers and the administration of the standing interrogatories already provided for. Now, however, under modern conditions, when the facilities for ascertaining the truth by subsequent investigation and the introduction of various kinds of evidence make even a considerable delay well worth incurring, it can hardly be doubted that the same judges would have freely exercised their discretion in the contrary direction. This would be peculiarly so if the question in debate were the validity and genuineness of the ship's apparent nationality."

Sec. 90. Spoliation of Documents. It has long been a rule of Prize Court procedure that the destruction of documents—the "spoliation" of documents—as it is called in the language of the Prize Courts, upon the approach of a capturing vessel is regarded as proof that the papers contained evidence which if it were made available would tend to establish guilt and such an act therefore justifies the Court in drawing inferences against the ship.[1] In most of the cases that were decided before the late war involving the spoliation of documents it was a question of the ship's papers and documents relating to cargoes. In the case of the *Ophelia*[2] which came before the British Prize Court in 1915, Sir Samuel Evans applied the rule to the destruction of secret codes for wireless telegraphy and the records of signalling lights on a vessel which claimed to be a hospital ship. The records of hospital ships, he said, should be "clean"; if they are, their preservation would be an additional safeguard against capture; if they are not preserved, but destroyed, the inference that, if produced, they would be silent but eloquent witnesses of guilty practices, would be strong." It was partly for the spoliation of such records that Sir Samuel condemned the *Ophelia* and that the Judicial Committee, on appeal, affirmed his judgment.[3] Their Lordships thought Sir Samuel had rightly laid much stress on the spoliations committed in the present case. They added:

"If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him

[1] See the opinion of Dr. Lushington in the *Johanna Emelie*, 1854 (Spinks 12 and 2 Eng. P. C. 252); also Story, *Commentaries on American Law*, 12th ed., Vol. I, p. 158.

[2] III Lloyd 13; I Br. & Col. Pr. Cas. 210.

[3] III, *ibid.*, 113; II, *ibid.*, 150.

In the case of the *Bangor* (V, *ibid.*, 308; II, *ibid.*, 206), it was stated that before the prize crew boarded the vessel those on board destroyed the code for wireless messages, the record of wireless messages received and other papers.

or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position in which he is without the corroboration which might have been expected in his case."

In the case of the *Baron Stjernblad*[1] the Judicial Committee declared that the destruction of documents when search is imminent is "a suspicious circumstance, irrespective of the person responsible for such destruction, and whether this person acted on the instructions or in the presumed interest of the cargo owners or otherwise." The French Prize Council applied the same principle and condemned an allied ship (Japanese) charged with transporting an enemy agent who was bearing sealed dispatches or news in the interest of the enemy, the inference of guilt being drawn from the circumstance that when the French torpedo boat approached the suspected ship for the purpose of visiting it, certain papers were thrown overboard. The Council declared that "according to the law of nations of which Article 3 of the *règlement* of July 26, 1778, maintained in force by the *arrêté* of the 29 *frimaire* of the year VIII, made application, a ship, whatever its flag, neutral or allied, is good prize when it has been established that papers have been thrown overboard or otherwise suppressed or withdrawn, without its being necessary to examine what were these papers and by whom they have been thrown overboard."[2] The German and Austro-Hungarian Prize Courts adopted a similar view.[3] The presence of false, irregular or incomplete papers or no papers at all is regarded in somewhat the same light as spoliation of documents. In the case of the *Kim*[4] Sir Samuel Evans adverting to the fact that the goods were invoiced as rubber, said:

"Any concealment or misdescription, or device calculated and intended by neutrals to deceive and to hamper belligerents in their undoubted right of search for contraband, will, while I sit in this Court, weigh heavily against those adopting such courses when any presumptions or inferences

[1] VI Lloyd 99; III Br. & Col. Pr. Cas. 17.

[2] The *Iro-Maru*, Fauchille, *Jurispr. Franc.* 323. Affirmed by the Council of State, 27 *Rev. Gén. de Droit Int. Pub., Jurispr.* 33. To the same effect the *Alfonso*, XIII (*ibid.*, 313).

[3] The *Haelen* (II *Entsch.* 177); the *Gjovadje* and *Papagallo* (*Normal Verordnungsblatt für die K. u. K. Kriegsmarine*, 7 Stück (1917), p. 64).

[4] I Br. & Col. Pr. Cas. at p. 472. Compare also the *Alwina* (II, *ibid.*, 186), the *Sörfareren* (I, *ibid.*, 589) and the *Ran* (III, *ibid.*, 621). See also the German case of the *Bertha Elisabeth* No. 2 (I *Entsch.* 58) and the French cases of the *Persepolis* No. 3 (Fauchille, *Jurispr. Franc.* 212), the *Pao-Hing-Lie* (*ibid.*, 438), the *Barcelo* (*ibid.*, 412) and others.

have to be considered. Neutrals are expected to conduct their neutral trade during the war not only without having recourse to fraud or false papers, but with candour and straightforwardness."

Sec. 91. Pleadings. Order VIII of the British Prize Court Rules of 1914 deals with pleadings. It provides that a party instituting a cause or making a claim shall, if ordered by the judge, file a petition and serve a copy on the other party, who may within seven days file an answer thereto and forthwith serve the same and that there shall be no further pleadings except by order of the judge.[1] The Order is based on the former practice of the High Court of Admiralty which allowed a further hearing on plea and proof in exceptional cases. Under the present rule permission to plead may be given by the Court, as under the old practice, but with this difference, that formerly a preliminary hearing had to precede the order for plea and proof. In fact, during the late war there were no pleadings in prize cases, Sir Samuel Evans having declined at the very outset to make orders for the delivery of pleadings, such a procedure, in his opinion, being unnecessary. His policy was followed by his successors and all cases were therefore tried without pleadings. The new practice is more simple and more limited than the former practice and has in consequence been commended as an improvement.[2]

Sec. 92. Discovery of Documents. Naturally under a procedure in which any evidence whether from the ship's papers,

[1] Forms of pleadings may be found in Appendix A, No. 13, of the Prize Court Rules (pp. 47 ff.). On the subject of pleadings see Tiverton, *op. cit.*, pp. 80 ff.

[2] Roscoe, "Prize Court Procedure," *Br. Yr. Bk. of Int. Law*, 1921-22, p. 97; also his *History of the English Prize Court*, p. 74. Mr. Roscoe observes that:

"It may be taken as a principle of procedure that the fewer steps there are between the commencement of a cause of any kind and its decision, the better. This principle is conspicuous in British prize procedure, and, although many prize causes have raised difficult commercial points, the absence of pleadings has not, on the whole, proved detrimental to the efficient trial of causes. It indicates also that a practice of requiring pleadings as a matter of course is based on a wrong assumption, which is that one party does not know the points upon which the other relies, and that it is impossible to try a case satisfactorily unless the points on which the case of each party depends are placed before the Court in black and white. The practice of the Prize Court for eight years has proved that written statements of opposing cases are not generally necessary for the satisfactory trial of an issue. This fact suggests to the observer of English procedure the question whether pleadings in civil actions in municipal courts should be generally required, whether indeed they should only be allowed in exceptional cases." In the case of the *Oregon* No. 3 (II Br. & Col. Pr. Cas. 352), the Prize Court of British Columbia stated that "pleadings" and "particulars" of the grounds for condemnation would be ordered only in very special cases.

from witnesses, or from extrinsic sources, is admissible and under which each party—captor or claimant—is entitled to have the evidence produced, there must be some means of "obtaining discovery of documents." By the Prize Court Rules of 1914 (Order IX) any party to a cause and matter may apply to the judge for an order directing any other party "to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein, and the judge shall make such order, either generally or limited to certain classes of documents, as he may think fit, provided that discovery shall not be ordered unless the judge shall be of opinion that it is necessary either for disposing fairly of the cause or for saving costs."

Without means of obtaining information in this way it would often be impossible for captors to prove a clearly hostile destination of contraband goods.

Sec. 93. Nature and Extent of the Power. An example of the sweeping character of the form which orders for discovery of documents took during the late war was afforded by the case of the *Balto*[1] where Sir Samuel Evans made an order that the claimant should within 14 days "make discovery upon oath of all books of account, letter books, and usual commercial documents relating to the matters in question, and in particular, ordinary business books from January 1, 1913, up to the present time, showing all purchases of leather, and all sales and proposed sales of leather and boots since January 1, 1913, together with all contemporaneous cables and correspondence relating to such sales or proposed sales." The claimants protested against the order in so far as it included documents relating to boots as well as leather, for the reason, as they contended, that the leather (destined to Sweden) could not in any circumstances be seized as prize, if it was intended to be manufactured into boots in Sweden, even though the boots were to be exported to the enemy forces in Germany. But Sir Samuel overruled the contention and held that the order for discovery should include the documents relating to the boots as well as to the leather.

In the case of the *Consul Corfitzon*[2] an appeal was taken by the claimants, to the Judicial Committe from an order of Sir Samuel Evans requiring them to make discovery on oath of all

[1] Lloyd 141; II Br. & Col. Pr. Cas. 398. See also the unreported case of the *Bravo*.
[2] VI, *ibid.*, 268; III, *ibid.*, 8.

books of account, letter books and usual commercial documents relating to the matters in question, including the books, contracts, policies of insurance, cable messages, and correspondence referred to in the order. The appellants contended that the order so far as it required the discovery of other documents than account and letter books and the usual commercial documents, was beyond the jurisdiction of the Court, was wrong in law and in the present case was oppressive in its results. The matter should, it was argued, have been left to the judgment or conscience of the person to whom the order was directed to determine for himself what documents should be produced. But the Judicial Committee rejected this contention. Lord Parker thus dwelt upon the necessity of discovery of documents as a means of enabling captors to prove their cases:

"The goods, having been shipped in a neutral vessel, and ostensibly destined for a neutral port, can only be contraband of war, if on the principle of continuous voyage, and according to the real intention of the parties concerned in the transaction they had a further ultimate destination in an enemy country. Intention is rarely the subject of direct evidence. As a rule, it has to be inferred from surrounding circumstances, and every circumstance which could, either alone or in connection with other circumstances, give rise to an inference as to the intention of the parties concerned in a transaction both relates and is relevant to the question what that intention really was.

"In the present case one of the matters in question is how the appellant intended to dispose of the goods to which these proceedings relate after their delivery at Karlskrona. Were they intended by him for consumption in Sweden, or had they a further destination, and, if so, in what country? It appears to their Lordships to be beyond dispute that inferences on this question might properly be drawn from the course and nature of the appellant's business in goods of a similar nature both before and after the outbreak of the present war, and in particular from the volume of his trade with Germany before and since such outbreak. All documents which throw light on these matters must therefore fall within the principle laid down in the case above referred to. The order for discovery being limited to documents which may throw light on the nature and course of the appellant's business, and the volume of his trade with Germany for some months before the war and since the outbreak of the war, it is, in their Lordships' opinion, impossible to hold that the order was wrong in law."

Lord Parker declared that the order was not oppressive; that it did not involve the appellant in any great trouble or expense and he pointed out that "full and complete discovery by the claimant might be the best and readiest mode of establishing his own case, if it be a good one." In reply to the statement of counsel that if the appellant complied with the order he would

be liable to punishment under the Swedish War Trade law of April 17, 1916, forbidding under penalty the disclosure of such information, Lord Parker said:

"But, however this may be, their Lordships are clearly of opinion that a Court of Prize cannot properly be deterred from making what it conceives to be the appropriate order because a neutral claimant would, if he obeyed the order, be guilty of a breach of his own municipal law. The substantive law administered by the Court is international law, which cannot be affected by the municipal legislation of any one State, and its practice and procedure is governed by the municipal law of the State from which it derives its jurisdiction, and cannot be modified by the municipal legislation of any other State."

In the case of the *Kronprinzessin Victoria*[1] Sir Samuel Evans suggested to the claimants (without making an order for discovery) that they produce in court their original trade books and bank books covering a reasonable period before the war and any other documents that might throw light on the case, this in their own interest. They declined to do so, whereupon he condemned the goods, concluding his judgment as follows:

"They have failed to satisfy me of the truth of their case. From the evidence adduced and from all the circumstances of the case, including the conduct of the claimants, I draw the inference that the coffee seized was not bought by them for the purpose of consumption in Sweden or in order to become part of the common stock of that country or for the purpose of re-sale to any neutral country, but was shipped to and received by them to be forwarded through Sundsvall to Hamburg."

Upon appeal to the Judicial Committee their Lordships made the following observations regarding the refusal of the claimants to produce their books:

"There is, further, the fact that the appellants declined to produce their books in Court. Here again, be it observed, the President did not order them to embark on an enquiry which they had not opened, or order that proof of a particular branch of the case should be given in one way only. The appellants had vouched in their own favour on one aspect of the case their own record of certain selected transactions; they had the opportunity of completing that aspect of the case from materials of the same class in their own possession by way of rebuttal of the captors' evidence, and to make that opportunity fruitful were informed how best, in view of the President's great experience of these cases, they could present such evidence so as to bring conviction to his mind. It is nothing to the point to argue that they had engaged in a trade which to them was lawful, although pursued at their peril, or to say, as they did say, that their trading books were required in Sweden, and that Swedish law placed a limit on the extent to

[1] VII Lloyd 230; III Br. & Col. Pr. Cas. 247.

which they could give 'discovery throwing light upon our case.' They claimed the coffee in the Prize Court here, and if the evidence by which their case might have been cogently supported was required for their other business in Sweden, it was for them to choose whether they would conduct their case or their business to the better advantage. Their Lordships fully appreciate the learned President's view that an offer of inspection of the books in Sweden 'by a notary public or otherwise' was, in the circumstances, almost illusory. As to the reference to the law of Sweden, the matter has been dealt with in other cases. Though loath to credit that Swedish law, truly understood, does restrict the right of a Swedish subject to support a case, which he is concerned to prove, by the best evidence of his own transactions, and while recognising that, if it be so, this is not a matter for their criticism or animadversion, but solely one for the judgment of the government and legislature of the Kingdom of Sweden, their Lordships must observe, as they have observed before, that it is impossible for a court of prize, an international tribunal, to allow its investigation of the truth of the matters brought before it to be limited by the restrictions of the municipal law affecting one of the parties to the proceedings before it. Their Lordships cannot hold that a captor's evidence is not to prove whatever it is capable of proving, merely because the claimant is not permitted by the laws of his country to produce the evidence appropriate to rebut it."

Sec. 94. Penalty for Non-Compliance with Order. In another case Sir Samuel Evans disallowed the claim of a Swedish subject because he refused under order of his government to make the discovery which had been ordered by the Prize Court, and the Judicial Committee affirmed Sir Samuel's judgment. Their Lordships, adverting to this case, said:

"It is quite impossible for a Prize Court administering international law to accept the dictates of any municipal law as to what discovery ought or ought not to be insisted on, either generally or in any particular case. The Prize Court can, however, protect itself; but this is not so with the Swedish subject. He is in a dilemma. Either he must act in contempt of the order of the Prize Court and so lose his case, which may be a perfectly good one. or he must prove his case to the Prize Court, and in so doing incur penalties under his own municipal law. The position is anomalous, but the anomaly is certainly not due to any defect in the practice of the Prize Court or in the law which it administers."[1]

Again in the case of the *Antilla and other vessels*[2] Sir Samuel Evans struck out a claim to goods because of the refusal of the Swedish claimants to comply with an order for discovery. In

[1] The *Baron Stjernblad*, VI Lloyd 99; III Br. & Col. Pr. Cas. at p. 22. But Sir Samuel Evans refused to make an order for an inquiry to ascertain what portion of the insurance had been paid by neutral underwriters, adding, "As I have said in other cases, the Prize Court will not embark on any such inquiry." The *Rijn* (II Br. & Col. Pr. Cas. 524).

[2] VII Lloyd 403; III Br. & Col. Pr. Cas. 237.

this case a chartered accountant was sent to Sweden on behalf of the Crown to examine the claimant's books but they refused to allow him to inspect and examine any books or documents except those relating to the goods seized. This not being a compliance with the order for the wide discovery made by the Court the claimants' conduct was regarded as contempt for which their claim was struck out. Counsel for the claimants argued that it was unjust to dismiss their claims because they had not complied with so sweeping an order as to which a different view was taken in Sweden, but Sir Samuel declared that they were not the judges and that orders made by the Court must be obeyed under penalty of dismissal of their claims.

While recourse to the "discovery of documents" is undoubtedly necessary under modern conditions to enable captors to establish hostile destination in respect to contraband and while it may be equally beneficial to the claimant who has a good case, recourse to it necessarily results in delays in bringing cases to trial and sometimes entails great expense and inconvenience both to the Crown and to neutral claimants.[1] Unless therefore the discretion of the judge is wisely exercised it may lead to hardship and unnecessary expense to innocent neutral traders.[2]

The Prize Court Rules of 1914 (Order IX) in conferring upon the judge an unlimited power of ordering the discovery of documents reversed the old practice and introduced a new rule which had no place in British Prize Court procedure before the late war and in issuing orders for the production of accounts relating to business transactions taking place many months before the outbreak of the war the British Prize Court went to lengths which provoked much complaint among neutral claimants.[3]

[1] As to this see an editorial in 145 *Law Times* (May 18, 1918), p. 44.

[2] Compare Roscoe, "Prize Court Procedure," *Br. Yr. Book of Int. Law*, 1921-22, p. 95; also his *History of the English Prize Court*, p. 72. Sir Erle Richards, adverting to the practice of the Prize Court in ordering a general discovery of all books of account and other documents relating to business transactions covering a period antecedent to the War, remarks that it was naturally regarded as oppressive by neutral merchants because it enabled a belligerent government to obtain particulars regarding the trade of such merchants which might be made use of on other occasions and he adds that "it seems probable that British merchants will take the same view of so wide an order if they should be in the same position as neutrals at any future time." "British Prize Courts and the War," *Br. Yr. Bk. of Int. Law*, 1920-21, p. 28. See also the remarks of Baty, "Some Neglected Fundamentals of Prize Law," 30 *Yale Law Journal*, p. 43, to the effect that the practice of discovery made law "stink in the nostrils of business men." Compare also Colombos, *op. cit.*, p. 317.

[3] The writer of an editorial in the *Law Times* (Vol. 145, p. 43), adverting to the novelty of the new practice which he described as "fishing," suggested that the old procedure could have been employed in many cases to accomplish the same purpose as that sought by the new rule, particularly

Sec. 95. Costs and Security. English Practice. The introduction of the practice of discovery of documents has had the effect of increasing the cost of prize proceedings and thereby accentuated the importance of the question of security for costs. Under the Naval Prize Act 1864 (repealed by the Prize Courts Procedure Act, 1914) a claimant was required to furnish security to the amount of £60 within five days after entering his claim, but the Court had discretion to increase the amount. The old practice was not to condemn claimants in costs unless their conduct had been "grossly fraudulent," [1] so that the exaction of costs was really in the nature of a penalty for attempt to deceive the Court and not as in ordinary judicial procedure a means of indemnifying a successful litigant against pecuniary loss in consequence of the proceedings. Naturally, it was difficult to fix in advance by rule or statute the amount sufficient to cover the costs, and the Prize Court Rules of 1914 (Order XVIII) leave the amount to the discretion of the judge, unless otherwise provided by agreement or by statute. The rules provide that any person instituting a proceeding, other than a cause for condemnation, or making a claim and being ordinarily resident out of the jurisdiction of the Court, may be ordered to give security for costs, though he may be temporarily within the jurisdiction of the Court, and the proceedings may be stayed until such security is given. During the late war it was the

in the case of contraband goods consigned to neutral countries adjacent to Germany, by considering the proof of such a consignment as creating a presumption of hostile destination and throwing upon the claimant the onus of rebutting the presumption in the manner stated by Lord Stowell in the case of the *Magnus* (1 C. Rob. 31). This would be equivalent to the information now obtained by discovery. This, in fact, was done in many such cases.

[1] Story, *Notes on the Principles and Practice of Prize Courts*, p. 7; and the *Stanton* (1917), II Br. & Col. Pr. Cas. at p. 374. In this latter case Lord Parker remarked that this requirement was remarkable for two reasons: first, a claimant in condemnation proceedings was not as a general rule ordered to pay costs unless he had put forward a fraudulent or unjustifiable claim, and, second, he was, at any rate, up to the preliminary hearing the expense of judicial proceedings, are often confused with "costs" in until then, resting with the captors.

On the whole subject of costs see Tiverton, *op. cit.*, pp. 106 ff. This author points out that "costs" in the technical sense, that is, as representing the expense of judicial proceedings, are often confused with "costs" in the sense of the extraneous expenses incurred in connection with the detention of captured property. Expenses of the latter character are, in a proper case, recoverable by the owners from the captors as damages for wrongful capture and not as costs of procedure. The confusion arises because damages and costs usually go together, the claim in a case of condemnation being for "all such loss, costs, charges, damages and expenses" as have been incurred by the owner and whenever the owner is held to be entitled to restitution with damages, he is usually awarded costs as a matter of right.

practice of the Prize Court to make the value of the particular *res*, whether ship or cargo, the chief test for determining the amount of the security.[1] The amount is said to have ranged from £50 to £300, the maximum sum not being infrequent because of the long investigation of documents and books necessary in important prize cases.

Sec. 96. Who Bears the Costs? When a ship or cargo has been condemned and sold the expense is made a charge upon the proceeds which the Crown obtains therefrom. In the case of the *Adonis and other vessels* [2] Lord Sterndale said:

"There is no doubt that, where it is a matter of goods, if the goods are condemned, the Crown bears the expenses out of the fund which they get by condemnation; where the goods are released, the expenses are taken out of the fund which is released, subject to that deduction, to the claimants. . . . Where bail has been given and the goods afterwards condemned . . . there is simply an order of condemnation, and no order is made as to the repayment of the expenses which have been paid by the claimants on getting the release of the goods. But . . . that has simply been a custom in making the order in the Registry, and that there has been no case in which the question whether it is right has come either before the judge or the registrar or where it has been questioned in any way."

In view of the special circumstances in this case his Lordship directed that the amount of the expenses be repaid by the Crown to the claimants and no order was made for costs. In the case of the *Drottning Sophia and other vessels* [3] where Sir Henry Duke, discussing the questions of costs and the nature of security therefor, said:

"There are certain events of prize proceedings in which the liability for costs and charges and the nature of the security for that liability are already well ascertained. Apart from any exceptional circumstances goods and proceeds of goods which are the subject of proceedings in prize are, according to the ordinary practice of the Court, subject to a charge for costs and expenses of seizure and detention. If the captor obtains a decree of condemnation his interest in the goods or fund, the subject of the decree, is charged with these costs and expenses. If the claimant succeeds in the cause the decree in his favour leaves him to bear the like burden."

[1] Roscoe, *History of the English Prize Court*, p. 73; also *Br. Yr. Bk. of Int. Law*, 1921-22, p. 96. Mr. Roscoe thinks that since the claimant is nearly always a foreigner a uniform amount as under the Naval Prize Act of 1864 would be fairer to claimants and would diminish in some trifling degree the cost of the proceedings. A somewhat similar view is expressed by the editor of the *Law Times*, Vol. 145 (June 15, 1918), p. 126. This article contains a review and evaluation of English practice as to security for costs in prize procedure.

[2] IX Lloyd 296; II Br. & Col. Pr. Cas. 532.

[3] IX, *ibid.*, 290; III, *ibid.*, 659.

Then after referring to the above quoted passage from Lord Sterndale's opinion in the *Adonis,* he added:

"The substantial question now at issue is that which was left undecided in the *Adonis,* namely, whether a claimant who obtains release on bail of a captured ship or goods should be required, as a condition of the release, to pay unconditionally the costs and expenses already incurred. . . . To add to the loss of the confiscable subject the loss of an amount which is properly only a charge upon that subject, seems to me inconsistent with the general practice of the Court in relation to the release of captured property. It would also, in my opinion, be inconsistent with the terms of the form of prize bond which is found in Appendix A to the Prize Rules, 1914.

"On the whole I come to the conclusion that a claimant who pays costs and charges of seizure and detention upon receiving delivery of goods ought to have credit for the payment as against the security which represents the full value of the goods in the event of his failure in the litigation, and that the bail bond may be expressed in terms which will evidence this right."

In the case of the *Zamora*[1] it was suggested that the procedure prescribed by the existing Prize Court rules precluded the Court from awarding damages or costs in the existing proceedings, under which every action for condemnation is now instituted by The Procurator-General in behalf of the Crown and the captors are not, therefore, as under the old practice, necessarily parties. Consequently it was contended that the parties entitled to damages or costs must institute fresh proceedings as plaintiffs, not against the Crown, but against the actual captors. The Judicial Committee, however, rejected this suggestion and expressed the opinion that the necessity of new proceedings would "be extremely inconvenient and would entail considerable hardship on claimants." And it added: "If possible, therefore, the Prize Court rules ought to be construed so as to avoid it, and in their Lordships' opinion, the Prize Court rules can be so construed."

In the same case their Lordships considered the question as to whether the Crown or its proper officer could be made liable for damages or costs under Order V of the Prize Court rules which empowers the judge to make such order as to damages and costs, in case of failure of the captors to proceed, as he may think fit, although the order does not indicate against whom the writ is to be issued, whether against the actual captors or the Crown. The decision was in the affirmative. "Captors" in the sense of rule 3 of Order V meant the Crown.

[1] IV, *ibid.*, at p. 111; II, *ibid.*, 1.

"This Rule, therefore, distinctly contemplates that the Crown or its proper officer may be made liable for damages or costs. Neither damages nor costs could be awarded against persons who were not parties to the proceedings, and it can hardly have been the intention of the Rules to make third parties liable for the default of those who were actually conducting the proceedings."

Similarly Order VI was interpreted as entitling a claimant to claim costs and damages against the Crown. Finally Order XLIV which deals with appeals and security for costs was interpreted in the same sense. The committee observed that:

"In cases of appeals from a condemnation or in other cases in which the Crown by its proper officer would be a respondent, this provision could serve no useful purpose unless costs could be awarded in favour of the Crown, and if costs can be awarded in favour of, it follows that they can similarly be awarded against, the Crown."

In conclusion, it was said:

"In their Lordships' opinion, these Rules are framed on the footing that where the Crown by its proper officer is a party to the proceedings, it takes upon itself the liability as to damages and costs to which under the old procedure the actual captors were subject. This is precisely what might be expected, for otherwise the rules would tend to hamper claimants in pursuing the remedies open to them according to international law. The matter is somewhat technical, for even under the old procedure the Crown, as a general rule, in fact defrayed the damages and costs to which the captors might be held liable. The common law rule that the Crown neither paid nor received costs is, as pointed out by Lord Macnaghten in *Johnson* v. *The King,* subject to exceptions. Their Lordships, therefore, have come to the conclusion that, in proceedings to which under the new practice the Crown instead of the actual captors is a party, both damages and costs may in a proper case be awarded against the Crown or the officer who in such proceedings represents the Crown."[1]

Sec. 97. The Discretion of the Judge. In the case of the *Stanton*[2] the Judicial Committee interpreting Order XVIII of the Prize Court Rules, stated that it must be regarded as a relaxation in favor of claimants, of the rights with regard to the security of costs, which the Crown possessed under the earlier practice. It said:

"Claimants ordinarily resident within the jurisdiction of the Court need no longer give security. Claimants ordinarily resident out of the jurisdiction of the Court may, even though temporarily resident within

[1] As to damages, indemnities, etc., generally, see Chaps. XVI-XVII *infra.*
[2] II Br. & Col. Pr. Cas. 370.

such jurisdiction, be ordered to give security in such manner and amount as the judge may direct. Whatever be the precise meaning of the expression "within the jurisdiction of the Court," the present claimants certainly do not ordinarily reside within such jurisdiction, and therefore the President had power to make the order appealed from."

In this case the claimants contended that the discretion vested in the judge was a "judicial" discretion and that if it could be said that the judge exercised any discretion at all in this case, he did not exercise it "judicially" but in complete disregard of all considerations by which a judge in exercising such a discretion ought to be influenced.

Their Lordships readily agreed that the discretion conferred on the Prize Court judge in respect to security for costs, by the Rules of 1914 was a judicial discretion. Nevertheless, they did not think that the merits of the claim as they appeared from the evidence filed, nor the *onus probandi,* having regard to such evidence, were determining factors in considering whether the discretion had been properly exercised. Lord Parker thus stated the purpose of the rules embodied in Order XVIII:

"The object of the rules appears to be this. Persons ordinarily resident within the jurisdiction usually have property within the jurisdiction against which process of execution will lie, should they be ordered to pay costs. These, therefore, need not be required to give security. Persons ordinarily resident out of the jurisdiction have, as a rule, no property within the jurisdiction against which process will lie in a similar event. These, therefore, may be ordered to give security. The fact that they are ordinarily resident outside the jurisdiction, if nothing more be proved, will in an ordinary case justify the judge in ordering security. But if something more be proved—for example, if it be established that the claimant has property within the jurisdiction against which process will lie—the judge—in exercising his discretion, must take this into account. It would be in the highest degree inconvenient if the judge were in every case bound to consider the *onus probandi* as it appears on the evidence already filed, or the merits of the claim if it fell to be determined upon this evidence. He is, no doubt, entitled to look into both matters if he thinks fit—at any rate, on the question of the amount to which security should be ordered; but neither point affords the criterion as to whether security ought or ought not to be directed. The judge is entitled, on the one hand, to bear in mind that when the claim is *bona fide* made costs are not as a rule ordered against an unsuccessful claimant. He is, on the other hand, entitled to be guided by his own experience as to the type or kind of claim which usually turns out to be fraudulent. While bearing in mind that the object of the rule is to safeguard the Crown in the event of unsuccessful claimants being ordered to pay costs, he should not, either in ordering security or fixing its amount, ignore the effect of the order which he proposes to make in increasing the difficulty of enforcing *bona fide* rights."

In the case of the *Oranje Nassau No. 2 and other vessels*,[1] where certain goods had been ordered to be released on payment of costs when others had been condemned with costs and the security given had proved insufficient, leaving a balance of £219 due from the claimants on this account, the Crown asked for an order on the proceeds of the sale of the prize to cover the unpaid costs. The claimants, on the other hand, contended that the power of the Court to order payment of costs had been exhausted when it fixed at the outset the amount to be provided by the claimants by way of security. This contention was sustained by Sir Henry Duke, who held that the discretion as to costs conferred on the judge by Order XVIII could not be used to increase the burden of neutral claimants; that goods ordered for release in prize are subject to no execution at the suit of a creditor under municipal law and are free from all liability except for captors costs arising in the specific cause which are enforceable by international law; and that even assuming that the decrees against the claimants under which a balance of costs was due the Crown, created the relation of debtor and creditor, it would be contrary to principle to grant the Crown, as against the proceeds of goods released, an order in respect of unpaid costs in other causes in which the goods had been condemned and the amount of the security required had proven insufficient.

The practice of the British Prize Court in respect to allowing or refusing costs during the first year and a half of the war was thus summarized by the judge of the Ceylon court of admiralty, in prize, in the case of the *Australia:* [2]

"The question was raised in the case of *The Marie Glaeser* (1914) and Sir Samuel Evans observed that all questions of costs were left to the Prize Court under the new Rules, but he did not order any of the claimants to pay costs. In the subsequent case of *The Miramichi* (1914) after citing Order XVIII, Rule 1, the Learned President said that 'assuming that he had power to order the captors to pay the costs, he would not exercise it on the facts before him,' and went on to observe that, if there were an appeal to the Privy Council, he should be very glad to have the assistance of that tribunal upon the question. The Attorney-General replied that, on the hearing of the appeal, he would take the opportunity of inviting the attention of the Privy Council to the point. In the cases of the steamships *Antares, Norheim, Francisco, Toronto,* and *Idaho* (March 8, 1915), Sir Samuel Evans indicated that he would not give costs against the Crown and the Attorney-General interposed with the interlocutory observation, 'We never get them against the subject.' I have found no report of an appeal, if there was one, to the Privy Council in *The*

[1] III Br. & Col. Pr. Cas. 915.
[2] II Br. & Col. Pr. Cas. at p. 335.

Miramichi; but in the case of *The Roumanian* (1914) on appeal (1915), the Judicial Committee said that they had carefully considered the judgment of the President of the Admiralty Division in *The Miramichi* and entirely agreed with it. I am struck with the fact, however, that neither in *The Roumanian* nor in *The Odessa* and *The Wanderer* did the Privy Council award costs to the Crown, although in each case the decision of the Prize Court upholding the title of the captors was affirmed. Nor have I found in any of the available records any case in which costs have been given either to or against the Crown."

Where a claimant failed to comply with an order for security for costs, the Prize Court refused to hear counsel in support of his claim.[1]

The policy of requiring security for costs in prize proceedings has been questioned by Mr. E. S. Roscoe, registrar of the English Prize Court during the late war. He says:

"It is a charge against neutrals at the beginning of the proceedings, one which it is difficult for them to understand. It is true that without security the Crown would not recover costs, but where a ship or cargo is condemned the proceeds would bear the costs, and these would have a very small relation to the amount of such proceeds. As a penalty the payment of costs has no force. Ships or goods having been seized by a belligerent, any one who considers that he has a claim to them does, and always will, take every means in his power to obtain their release. The seizure of neutral property is an act of violence, necessary, no doubt, to the cause of the belligerent, but none the less a serious inconvenience to neutrals who are entitled to trade with a belligerent. If the latter obtains the neutral goods by a decree of condemnation after a seizure, the fact that the belligerent has pecuniarily benefited by the seizure seems to be sufficient without making the neutral pay for the costs of the litigation."[2]

[1] *The Jeanne and other vessels*, V Lloyd 293. In this case Sir Samuel Evans said:

"I ordered a very moderate sum to be given as security, and opportunities were afforded and assistance given by the government in this country for communications being speedily made to Mr. Roberg, in Gothenburg. I see no signs of any effort being made on the part of Mr. Roberg—I say nothing against his English solicitors—to comply with the order by filing any evidence in support of his case. In these circumstances, if I were to allow the claim to be supported by counsel appearing here for Mr. Roberg, any order that I may make for security for costs in cases like these would be absolutely futile."

The claimant having "put the Crown to a very great deal of trouble in investigating the cases, which would otherwise have been avoided," Sir Samuel gave an order for costs but he remarked to counsel for the Crown, "I do not think you will ever get your costs; he (the claimant) did not comply with the order for security." In the case of the *Alwina* (V Lloyd 127), Sir Samuel Evans released a vessel which had abandoned its original intention of carrying contraband to the enemy, but by reason of the conduct of the owner in resorting to fraudulent practices for the purpose of eluding the right of capture, he was charged with the costs and expenses of the capture and detention as well as the costs of the proceedings and his judgment was affirmed by the Judicial Committee.

[2] Article in *Br. Yr. Bk. of Int. Law*, 1921-22, p. 96; also his *History of the English Prize Court*, p. 73.

Sec. 98. The Same. German and French Practice. The matter of costs in the German Prize Courts is dealt with by Section 37 of the *Prisengerichtsordnung* of 1911. It provides that the judgment must determine who shall bear the cost of the proceedings; that where the claimant loses he shall be charged with the costs;[1] that in case of an unjustified capture the costs shall be borne by the captor state;[2] that the claimant is not entitled to reimbursement for expenses where a ship has been legally destroyed and there were sufficient motives to justify capture;[3] and that where a ship seized for transporting contraband has been released the costs and expenses incurred by the captor must be borne by the ship.[4] Where security for costs was not given the supreme Prize Court refused to examine the grounds of the appeal.[5]

It is an established rule of French prize jurisprudence that the expense (*frais*) occasioned by a capture, such as the expense incurred for the conservation or warehousing of the cargo or its debarkation, etc., together with the costs (*dépens*) of the prize proceedings (honoraria of the *avocats* and *avoués* of the ministry) shall be borne by the owner of the goods, where they are released or their value is paid to claimants. This is the rule embodied in the *règlement* of December 23, 1705.[6]

V

Other Matters of Procedure

Sec. 99. Power of Prize Court to Rescind Its Decrees and Allow a Rehearing. A British Prize Court has power to review its own decrees and to order a rehearing. In the case

[1] This rule was applied in the case of the *Brussels* 31 (I *Entsch.* 310; Fauchille et De Visscher, *Jurispr. All.* 236): and the *Star* (I, *ibid.*, 66; *ibid.*, 52).

[2] Rule applied in the case of the *Sydney Albert* (I, *ibid.*, 62; *ibid.*, 43) and the *Thorsten* (I, *ibid.*, 253; *ibid.*, 193).

[3] The *John Wilson* (I, *ibid.*, 326; *ibid.*, 246); the *Anvers* (I, *ibid.*, 138; *ibid.*, 105).

[4] The *Star* (*supra*). This is the rule of the Declaration of London (Art. 41). But in the case of the *Johanna* (II *Entsch.* 302) the German Prize Court refused to assess the costs on the ship because it was found not to have been carrying contraband.

[5] The *Glitra* (I *Entsch.* 34).

[6] Among other cases in which this rule was applied see the *Rioja* (Fauchille, *Jurispr. Franc.* 141); the *Teresa-Fabrigas* (*ibid.*, 149); and the *Virginia* (*ibid.*, 261). See also De Boeck, *op. cit.*, p. 393.

of the *Orcoma*[1] proceedings for condemnation had been instituted against a cargo by The Procurator-General without the knowledge of the claimants who had not entered an appearance, because they were unaware that a writ had been issued against the goods. The goods were condemned, whereupon the claimants, learning of it, asked for a rehearing with liberty to enter an appearance and file their claim. The Procurator-General contended that there was a strong case for condemnation on the documents and argued that it was contrary to the practice to rescind a decree in prize on any ground.[2] Sir Samuel Evans, however, held that the Prize Court had power to rehear the case and to review its decrees, although he emphasized that the power must be used with caution and he wished it to be understood that in exercising it in this case he was not "laying down any practice" and that his decision must not be regarded "as an encouragement to people who have been wanting in watchfulness and activity, after cargoes or ships have been seized."

In the case of the *Bolivar*[3] the Judicial Committee, reversing an order of Sir Samuel Evans, laid it down that a Prize Court has an inherent power to set aside its own judgment of condemnation so as to let in a *bona fide* claim by a third party, who has not in fact been heard, and has had no opportunity of appearing, if there would be substantial injustice in allowing the judgment to stand. In this case a writ had been issued against the ship and cargo, but the claimants, who were in Venezuela, had no notice or knowledge of the capture or of the proceedings and no appearance had been entered by or on behalf of them. The ship and cargo were condemned and sold and the proceeds paid into the Court. Learning of the capture and condemnation of the ship and cargo the claimants applied for leave to enter an appearance and put in a claim for the proceeds of the cargo. The application was refused on the ground that they had elected to submit their claim to the prize claims committee and had delayed making their application to the Prize Court. The Crown contended on appeal as in the case of the *Orcoma* that where a case is once tried and decided there is no general jurisdiction in the Prize Court to rehear the case and that it is within the dis-

[1] III Lloyd 1; 1 Br. & Col. Pr. Cas. 402.

[2] In support of this contention he cited *The Elizabeth*, 1807, 2 Eng. P. C. 115.

[3] III Lloyd 386; II Br. & Col. Pr. Cas. 175. See also the case of the *Mount Temple* (1921) where a decree of condemnation was rescinded because, owing to circumstances of *force majeure*, it was impossible for the claimants to produce at the time of the trial the necessary documents in support of their claim.

cretion of the Court whether there are exceptional circumstances justifying a rehearing in a particular case. The Prize Court having exercised its discretion in refusing the application, it should not be interfered with. But the Judicial Committee held that in a case like this where substantial injustice would otherwise result and where the application for relief had been promptly made, a rehearing should be allowed. The Prize Court, it thought, had refused the application under the mistaken impression that the appellants had invoked the assistance of the prize claims committee and that they had unreasonably delayed making the application. Its judgment therefore was reversed.

In the case of the *Alfred Noble and other vessels (No. 3)*[1] Sir Samuel Evans held that every court has an inherent right to set aside an order which it has made, if it has been procured by fraud and that this rule "applies to the Prize Court certainly as strongly as to any other court." The deponent in this case had made an untrue statement and had suppressed material facts which ought to have been laid before the Court. "It cannot be too well known," Sir Samuel added, "that claimants who desire to establish their claim must put their case honestly, fairly, candidly and fully before the Court. This has been said in the course of the last three years over and over again." Accordingly the order releasing the claimant's goods was rescinded and they were condemned.

Sec. 100. Procedure of the Privy Council. The procedure of the Judicial Committee of the Privy Council sitting as a court of appeal in prize cases, is similar to that of the Committee in the hearing of other appeals. The development of its appellate jurisdiction has been marked by a tendency on the part of the Committee to become more and more a court of law, but it was not until the end of the first quarter of the nineteenth century that this tendency was completed by definite legislation which placed appeals from the Prize Court on the same footing as admiralty appeals and those from the overseas dominions and India.[2] For a long time the reasons upon which its decisions were based were not generally stated, and the cases it decided were not fully reported prior to the Crimean War. But during this latter war a number of the decisions of Dr. Lushington were reviewed by the Privy Council, the opinions of their Lordships were fully reported and they are frequently cited as authority.[3]

[1] VIII Lloyd 27; III Br. & Col. Pr. Cas. 851.
[2] Roscoe, *History of the English Prize Court*, p. 92.
[3] It is stated that during the Crimean War 125 cases were appealed from

Since that time the place occupied by the Privy Council as a court of appeal in prize cases has been much more important; at the same time it has become more and more a judicial tribunal and less a supreme executive body issuing directions to a tribunal which was formerly regarded as subordinate and lacking independence.

During and following the close of the late war a large number of cases were appealed from the Prize Court at London and from those in the dominions and the colonies and the decisions of the committee constitute a large and important source of authoritative prize law.[1]

Sec. 101. Right of Appeal. Under section 5 of the Naval Prize Act, 1864, it is provided that "an appeal shall lie to Her Majesty in Council from any order or decree of a Prize Court, as of right in case of a final decree, and in other cases with the leave of the Court making the order or decree."

Under rule 2 of the Judicial Committee rules of 1908 "all appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a petition in that behalf, presented by the interceding appellant." In the case of the *Canton*,[2] Sir Samuel Evans having refused leave to appeal from an order requisitioning a quantity of copper on a neutral ship, the claimant petitioned the Judicial Committee for special leave under the prerogative to appeal, and for a stay of execution. During the course of the argument Lord Sumner stated that if it were an application under the royal prerogative to grant special leave to appeal, it must be shown that there had been some injustice or that there was some question of law to be determined. Counsel contended that there was no evidence against the petitioner, which under the old procedure would have caused the Court to do anything but release his goods, since the onus was on the Crown to prove hostile destination. Their Lordships refused to grant the application, on the authority of the decision in the case of the *Zamora*

the Prize Court in London to the Privy Council and that of these, 86 were affirmed, 14 reversed and 8 varied. *Ibid.*, p. 92, n. 3.

[1] It appears that actually seventy-eight cases were appealed to the Judicial Committee. Of these forty-two were appeals from the judgments of Sir Samuel Evans, Sir Samuel was reversed in eight cases and in four other cases his judgments were varied. Nine cases were appealed from the decisions of Lord Sterndale and an equal number from the decisions of Sir Henry Duke. Two of the former and four of the latter were reversed. Eighteen cases were also appealed from the decisions of the overseas courts. Of these five were reversed and three varied.

[2] VI Lloyd 51; II Br. & Col. Pr. Cas. 264.

where it was laid down that in order to justify the exercise of such a power the goods requisitioned must be urgently required for the defense of the realm and that there must be a real question to be tried, so that it would be improper to order an immediate release. In the present case it was not disputed that the first condition was satisfied. As to the second condition their Lordships were of the opinion that the question as to whether there was a real issue to be investigated or tried was one which could be better determined by the judge before whom the proceedings were pending than by the Judicial Committee. They did not think, therefore, that they could advise an exercise of the prerogative unless they were of the opinion that the judge had proceeded on wrong principles or had come to a conclusion which was obviously erroneous.

Sec. 102. Jurisdiction of the Judicial Committee. In the case of the *Kara Deniz*[1] the Judicial Committee laid down the principle that it would not pass upon questions raised by the appellants if they had not been passed upon by the Court from whose decision the appeal had been taken. In this case, Lord Sumner said:

"On the first occasion, either by arrangement or in the discretion of the learned judge, those questions do not seem to have been tried; on the second occasion it was unnecessary to try them because the vessel was condemned, and there it was conceived that the matter ended. It has been contended before their Lordships by counsel for the appellant, first of all, that there is such a grievance; and secondly, that it is one upon which their Lordships ought to pass an opinion in the appellant's favour. It is quite clear that, sitting in appeal, their Lordships could not investigate this matter for the purpose of giving a decision themselves if it was never passed upon at Bombay before a court there, and after proper examination of the facts in court; and their Lordships are clearly of opinion that no ground whatever has been made out for giving the appellant any relief in that connection. If he has any such rights, he should prosecute them in Bombay."

In the case of the *Ophelia*[2] involving the immunity from capture of an enemy vessel which claimed to be a hospital ship the question of whether it had lost its right of protection being almost entirely a question of fact, The Attorney-General contended that the findings of the Prize Court below should be regarded as conclusive and therefore not reviewable by the Judicial Committee. The Judicial Committee, however, pointed out that

[1] X Lloyd 355; III Br. & Col. Pr. Cas. 1070.
[2] III, *ibid.*, 13; II, *ibid.*, 150.

the cases relied upon in support of this contention [1] were collision cases appealed from the admiralty court and not prize cases and that they illustrated the advantage which the judge below had in seeing and hearing the witnesses. Sir Arthur Channell, speaking for the Judicial Committee, said:

"Their Lordships are of opinion that this appeal must be treated as a rehearing, in the same way as an appeal to the Court of Appeal from a judge sitting without a jury in the High Court. There is jurisdiction to review the findings of the judge; but the appeal court gives very great weight to the fact that the judge below hears the witnesses, which they do not, and practically acts on the opinion of the judge as to the credibility of the witnesses before him and the weight to be attached to their evidence. Here the evidence for the Crown was all on affidavit, and the evidence for the claimant was given orally, after his witnesses had had an opportunity of studying the evidence for the Crown."

Adverting to the contention of counsel that the claimants' evidence explained rather than contradicted the facts on which the Crown relied, Sir Arthur concluded:

"To a great extent that is so, but there seem some contradictions of fact, and some points on which the learned President appears not to have accepted as trustworthy the oral evidence which he heard. On these points their Lordships would not lightly differ from the learned President, but many matters have been raised on the argument of the appeal which cannot be disposed of satisfactorily by treating them as matters of fact concluded by the view of the President. Their Lordships, therefore, feel it their duty to review the facts in some detail."

Appeals were not infrequently denied for various reasons: because the period during which the right of appeal was allowable, had expired; [2] because insufficient reasons justifying the appeal were given; [3] because those who appealed were not those who put forward the claim in the lower court; [4] because the appellants failed to furnish security for costs; [5] because the claim-

[1] He cited the cases of the *Julia*, 1860 (14 Moore P. C. 210), and the *Princess Alice*, 1868 (2 P. C. 245), in support of his contention.

[2] The *Insulinde No. 3* (Fauchille, *Jurispr. Franc.*, 187). In the case of the *Narrovian* (28 *Rev. Gén.*, 1921, *Jurispr.* 23), the French council of state discussed the nature of appeal from the Prize Council and the conditions under which appeals may be taken to the council of state.

[3] The *Mineral No. 1* (I *Entsch.* 184).

[4] The *Zaanstroom* (I *Ibid.*, 118); the *Remonstrant* (VI Lloyd 339) and the *Wally* (1 *Entsch.* 223). In the case of the *Remonstrant* the Judicial Committee found that the appellants turned out to be a German company seeking a judgment which had been sought and denied them in the lower court; it was therefore not an appeal but a new proceeding and was not allowable.

[5] The *Chantaboon and others* (Siam), 46 Clunet 428.

ants refused to obey an order of the Court for the discovery of documents;[1] because the appellants were not at the time of seizure the owners of the goods;[2] because the question involved was one merely of fact and not of law;[3] etc.

[1] The *Kronprinsessan Margareta*, VI Lloyd 105 (note); the *Antilla and other Vessels*, VII Lloyd 405.

[2] The *Kronprinzessin Cecile* (VIII Lloyd 125). In this case the Judicial Committee also held that an application for amendment could not be entertained nor could an error in the order of the Prize Court be corrected, at the instance of appellants who had no interest which entitled them to be heard.

[3] The *Atahualpa*, July 17, 1916 (unreported).

CHAPTER IV

LAW APPLIED BY THE PRIZE COURTS

I

International Conventions

Sec. 103. Questions Raised. In deciding the cases that came before them the Prize Courts sometimes had to apply (and frequently to interpret) multilateral international conventions, occasionally bilateral treaties, often the customary law of nations and not infrequently the prescriptions of national prize regulations or legislative acts of the countries in which they sat. Sometimes where the provisions of international conventions furnished a controlling rule or principle it was necessary to decide the preliminary question whether the particular conventions had been duly ratified in accordance with their own stipulations and were therefore actually in force and binding on the Court. Likewise, it was necessary at times to decide whether in case a convention was found to be in force by reason of its ratification, it was binding, when it was established that the opposing belligerent had refused to observe its prescriptions, that is, whether the validity of the convention was conditional upon reciprocity of observance by the party invoking its benefit. Again, where a national prize regulation or legislative act provided a rule which differed from the rule of the customary law of nations, the Prize Court had to determine which of the two was binding upon it and which should therefore be applied. The question of the weight which should be given to judicial precedents and to the opinions of eminent text writers was also one which occupied the attention, particularly of the British Prize Courts. Finally they were sometimes called upon in this connection to determine whether they were justified in taking into account changed conditions and circumstances which had come about subsequent to the pronouncement of earlier decisions and therefore of departing from the rules laid down by former Prize Courts, when strict adher-

ence to them would lead to hardship and inequity. In deciding these and other questions the Prize Courts of different countries not infrequently traveled different roads and sometimes reached different conclusions.

Sec. 104. State of Maritime Prize Law in 1914. The Declaration of Paris. The outbreak of the world war found the law of maritime prize in a far less developed state than that of land warfare. As has been observed, there was "not any single law of nations binding upon the Prize Courts, but a number of different practices, each claiming to be the true doctrine, and each administered by national courts." [1] Sir Edward Fry remarked at the Second Hague Peace Conference that prize law was "not much more than a chaos of opinions which are often contradictory, and of decisions of national courts based upon national laws." [2]

In these circumstances, as the Judicial Committee said in the case of the *Zamora*, the Prize Court had itself "to determine what the law is to the best of its ability." The international conventions in force relating to maritime prize law were few and relatively unimportant, and as to some of these there was doubt as to whether they were technically, at least, in force during the war and therefore binding on the Prize Courts.

In the first place, there was the Declaration of Paris of 1856 which had become by formal accession or tacit acceptance by all the powers an established part of the general body of international law. But occupying only a half dozen lines of print and limited to the briefest statement of a few general principles regarding the immunity of goods from capture and as to what

[1] Bentwich, *The Declaration of London*, p. 3.

[2] A number of continental countries had, or promulgated shortly after the outbreak of the war, "codes" of prize law, in the form of ordinances, regulations, instructions, etc. Such were the German *Prisenordnung* of Sept. 30, 1909, and the *Prisengerichtsordnung* of April 15, 1911; the French *Instructions* of Dec. 19, 1912 (revised 1916); the Italian *Rules for the Exercise of the Right of Capture*, March 25, 1917 (text in Fauchille et Basdevant, *Jurispr. Ital.*, Annexe, pp. xlv ff.), and the Merchant Marine Code of Oct. 24, 1877; the Austrian Regulations (*Dienstbuch*), promulgated May 2, 1913 (Eng. trans. in *Procs. Orders in Council and Docs. Relating to the European War Compiled and Published by the Sec. of State of Canada*, 1916, 2d Supp., pp. 425 ff.); the Russian Prize Regulations of March 27, 1915, in force during the World War (French trans. 4 *Rev. Gén. de Droit Int. Pub.*, 1897, *Docs.*, pp. 6 ff.); the Belgian *Loi organique du Conseil des prises*, Aug. 26, 1919 (*Moniteur Belge*, Sept. 1-2, 1919), to which may be added the Chinese Regulations Governing the Capture at Sea, 1917 (Eng. trans. in Cheng, *Judgments of the High Prize Court of the Republic of China*, pp. 136 ff.), and the Siamese decree of July 20, 1907 (Eng. trans. in *London Gazette*, Sept. 18, 1917). As to these national regulations see my *Int. Law and the World War*, Vol. I, pp. 9 ff., and the valuable notes of Verzijl, *op. cit.*, Annexe II, pp. 1357 ff.

constitutes a lawful blockade it laid down no tests to be applied in determining enemy character, or as to what constitutes contraband, or what rules shall be adopted in determining its liability to capture. Various matters in respect to blockade, which have since become a frequent subject of controversy were left untouched by the Declaration.[1]

Sec. 105. The Same. The Hague Conventions. The first Hague Conference did not occupy itself at all with the subject of maritime war and while the program of the Second Conference apparently contemplated the formulation of a maritime "code" to supplement the regulations concerning land warfare, the actual achievements were disappointing. A number of conventions were formulated and some of them were generally ratified but they were not comprehensive and they have been characterized as being "more remarkable for what they omitted than for what they settled" and that "in many cases where they professed to establish a rule, its value was whittled away by its vague statement."[2] Among these conventions were those relative to the treatment of enemy merchant vessels in port at the outbreak of war, the conversion of merchant ships into war vessels, the adaptation to maritime warfare of the principles of the Geneva Convention, naval bombardments, certain restrictions upon the right of capture in naval warfare and the rights and duties of neutral powers in naval warfare. Some of them left unsettled important questions concerning the matters with which they dealt and none of them pretended to deal with the important subjects of blockade, contraband, visit and search, destruction of prizes, transfers of flag and unneutral service. In the final act of the conference the *voeu* was expressed that "the preparation of regulations relative to the laws and customs of naval war should figure on the program of the next conference and that in any case the powers might apply, as far as possible, to sea warfare, the principles of the convention relative to the laws and customs of war on land."

Sec. 106. The Same. The Declaration of London. The third conference has never been called but the preparation of the

[1] Lord Sumner in the case of the *Kronprinsessan Margareta and Other Vessels* (VII Lloyd 241; III Br. & Col. Pr. Cas. 803), adverting to the non-comprehensiveness of the Declaration observed: "It says nothing about the criteria by which the enemy or neutral character of goods is to be determined; it says nothing about the doctrine of 'infection'; it says nothing about admissibility or rules of evidence; it says nothing of the rights of a belligerent to repress traffic in contraband of war, or of the modes by which Courts of Prize give effect to and protect those rights."

[2] Bentwich, *op. cit.*, p. 1.

regulations recommended by the second conference was in part attempted by the international naval conference at London in 1908-09 and the results were embodied in an international Act known as the Declaration of London, which, however, had not been ratified by any of the powers at the time of the outbreak of the war.[1] Since, however, many of the rules embodied in the Declaration were merely declaratory of the preëxisting customary law and practice—it was in fact stated in the preamble that "the signatories are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law"—they were, as such, binding upon the belligerents and their Prize Courts, equally with other rules of customary international law, without regard to the status of the Declaration in which they were embodied. Such of its rules, however, as constituted innovations upon or departures from the customary law—and the Prize Courts held that some of its rules were of this character, notwithstanding the contrary assertion in the preamble—were not binding upon the Prize Courts.

The provisions of the Declaration had, in the main, already been embodied in the prize regulations of a number of countries before the outbreak of the war and were incorporated in those of other countries, subsequent thereto. Upon the outbreak of the war the Declaration, notwithstanding its non-ratification, was put into effect by decrees or orders of various belligerent governments, usually with alterations or additions, although Great Britain and France subsequently revoked their orders and decrees and announced that henceforth they would not be bound by the Declaration but would exercise their belligerent rights at sea in strict accordance with the "law of nations."[2] The attitude of the Prize Courts toward the Declaration varied therefore with the successive changes of policy adopted by their governments in respect to the Declaration. In the sections immediately following, their attitude toward the various international conventions will be examined in turn.

Sec. 107. Application by Prize Courts of Declaration of Paris. All the Prize Courts which were called upon to decide questions involving the application of the Declaration of Paris

[1] As to the efforts of the American government at the outbreak of the war to induce the belligerent maritime powers to agree to observe the Declaration notwithstanding its non-ratification, see the correspondence in *Spec. Supp. to Amer. Jour. of Int. Law*, Vol. IX, pp. 1 ff.

[2] As to the attitude of the various belligerent governments toward the Declaration, see my *Int. Law and the World War*, Vol. I, pp. 29 ff.

recognized its prescriptions as constituting an established part of international law and therefore binding upon them.[1] In the case of the *Marie Glaeser*,[2] decided in September, 1914, Sir Samuel Evans reviewed the history of the Declaration and concluded as follows:

> "Our own country, one of the original parties to it, has strictly adhered to it.
> "This Court accordingly ought to, and will, regard the Declaration of Paris, not only in the light of rules binding in the conduct of war, but as a recognized and acknowledged part of the law of nations, which alone is the law which this Court has to administer."

It was interpreted and applied by the British Prize Courts in various subsequent cases.[3] The German Prize Court in the case of the *Indian Prince* [4] referring to the principle of "enemy ships free goods," said: "its validity, however, is not derived from any special treaty, but from common international law as laid down in the Declaration respecting maritime law adopted at Paris in 1856, which, according to the German prize regulations, applies also to countries like the United States which did not agree to that Declaration." Nevertheless, while the Prize Courts regarded the Declaration of Paris as a binding international act they generally interpreted its provisions in a very strict sense and occasionally refused to accord claimants the benefits of the Declaration when, if a more liberal interpretation had been placed upon it, their goods would have escaped condemnation.[5] Moreover, by means of reprisals measures adopted by some of the belligerents in 1915, the provisions of the Declaration were seriously infringed upon, if not disregarded.[6]

Sec. 108. Attitude of Governments Toward the Hague Conventions. As is well known, a number of the belligerents in the late war, notably Bulgaria, Italy, Liberia, Montenegro,

[1] Although the government of the United States has never formally given its adherence to the Declaration, the *Instructions for the Navy of the United States Governing Maritime War* (1917) state that the United States "has in practice followed its provisions" (p. 7) and Articles 2 and 3 of the Declaration are expressly reproduced among the rules which the *Instructions* lay down (see Arts. 67, 68).

[2] I Lloyd 56; I Br. & Col. Pr. Cas. 38.

[3] Notably in the cases of the *Schlesien*, the *Miramichi*, the *Roumanian*, the *Sörfareren*, the *Jeanne*, the *Dandolo*, the *Dirigio and Other Vessels*, the *Kronprinsessan Margareta*, the *Batavier II* and *Batavier VI*, the *Bawean*, and the *Bergenhus*.

[4] I *Entsch.* 87; Fauchille et De Visscher, *Jurispr. All.* 69.

[5] The interpretations of the provisions of the Declaration are discussed below in Chapter VIII.

[6] See Secs. 251-254 *infra*.

Serbia, and Turkey, had not at the outbreak of the war ratified any of the Conventions of 1907.[1] Certain other powers had not ratified some of them. In consequence of the so-called "solidarity" or "general participation" clause which they all contained, and which declared that the provisions of the Convention were not applicable except between the contracting parties and then only when all the belligerents were parties, none of them were, technically at least, binding on any of the belligerents. Nevertheless, it may be said that some of them were merely revisions of the corresponding Conventions of 1899 to which all the belligerents were parties, and were for that reason binding. What was said also of the Declaration of London in this connection, namely, that in so far as the provisions of an international convention are merely declaratory of the existing customary law of nations, they are binding as such, may be said equally of such provisions of the Hague Conventions as were merely declaratory of established custom and practice.[2]

In practice, belligerent governments generally did not take advantage of the circumstance that the Conventions of 1907 had not been ratified by all the belligerents, in order to avoid their obligations under them, although there were some exceptions. Thus the German government in its reply of November 7, 1914, to the British protest against the German practice of laying mines in the open seas in violation of the 8th Convention, stated that the British government overlooked the fact that the Convention had not been ratified by all the belligerents in consequence of which it was not binding on any of them.[3] Likewise the German government announced in March, 1917, that it would not regard the 11th Convention (relative to certain restrictions upon the right of capture in naval warfare) as applicable during the existing war, because a number of the belligerents, particularly Russia and Italy, had not ratified it. In his correspondence with the American government regarding the *Appam* the German ambassador at Washington maintained that art. 23 of the 13th Convention relative to the Rights and Duties of Neu-

[1] The British Prize Courts, at least, refused to accord the benefit of the Hague Conventions to the subjects of states which had not ratified them. The *Maria* (I Br. & Col. Pr. Cas. 259).

[2] As to this see my work cited, Vol. I, p. 20, and the opinions there cited. As to the status of the conventions of 1907 see also Hudson, 16 *Amer. Jour.* 375; 9 *ibid.* 193 and Fauchille, 22 *Rev. Gén. de Droit Int.* 106 and 25, *ibid.*, 80. The Chinese Prize Court in the case of the *Dike Rickmers* (*Judgments of the High Prize Court of China* 50), affirmed what is generally admitted that the 6th Convention was merely declaratory of the preëxisting practice.

[3] Spec. Supp. to 11 *Amer. Jour.*, p. 17.

tral Powers in Naval Warfare could not be invoked by the British government for the reason that it had not been ratified by Great Britain. Counsel for the British government, on the other hand, argued that since the article was merely declaratory of an established rule of customary international law, it was binding independently of the status of the Convention as a whole. Somewhat inconsistently, it would seem, the German ambassador while rejecting this contention, maintained that article 21 respecting the sequestration of prizes in neutral ports was binding because it was merely declaratory of the existing rule of international law.[1] Thus there was a disposition on the part of the German government when it had occasion to invoke the benefits of a particular convention to ignore the effect of the solidarity clause; but to rely upon it when it desired to avoid the obligations of a convention.

Sec. 109. Attitude of the Prize Courts in Respect to International Conventions in General. At the outset, the question was raised as to whether a convention which had been duly ratified and proclaimed but the provisions of which had not been formally inserted in the national prize regulations or which had not been expressly approved by legislation, was binding on the Prize Court. In the case of the *Bärenfels*,[2] Judge Cator, adverting to the reliance of counsel upon the 6th Convention, said:

> "It has been assumed, as I think rather lightly, that because the Hague Conventions are binding on the Crown effect must of necessity be given to them in this Court; but that by no means follows.
>
> To adopt the words of a celebrated American judge, speaking of nations other than the United States, a treaty is in its nature a contract between two nations, not a legislative act. And it may be taken as a general rule that British courts should not attempt to enforce a treaty without some authority emanating on that behalf from the Crown. Consequently I must consider how, if at all, the Hague Conventions have been made binding upon our Prize Courts."

Nevertheless, Judge Cator concluded that although there was no express legislation putting the Convention into effect, the Order in Council establishing the Prize Court and the commissions issued to the judges thereunder requiring them to determine

[1] *Diplomatic Correspondence with Belligerent Governments Respecting Neutral Rights and Commerce, European War*, No. 3, p. 334; also brief of Mr. F. R. Coudert in the case of the *Appam*, p. 7. As to other cases in which the benefits of the Conventions of 1907 were invoked and denied in similar circumstances, see my work cited, Vol. I, p. 22.

[2] I Br. & Col. Pr. Cas. 122.

causes "according to the course of admiralty and the law of nations," removed the difficulty, since it could hardly be denied that the Hague Conventions to which Great Britain was a party must be deemed a part of the law of nations. Furthermore, the Prize Court Rules of 1914 (Order No. XXVIII) distinctly recognized the possibility that the Court might be called upon to order the detention of enemy merchant vessels in pursuance of some international convention. He was therefore prepared to hold that he was bound by the 6th Convention.[1]

Judge Grain agreed with his colleague. Adverting to the opinions of various text writers and judges that international conventions do not become applicable until they have received express legislative sanction, he declared that while this principle might be binding upon a court which administers municipal law solely it was not binding upon a Prize Court sitting to administer the law of nations. He added:

"British law may be said to have always recognized international law as a certain collection of certain rules which have become binding on States, either by immemorial usage or by virtue of agreement. And when once a rule of law is shewn to have received the assent of civilized States it will be deemed to have received also the assent of the British courts, and will be applied by courts sitting in any capacity which necessitates the straying from the ordinary paths of municipal laws to the fields of the law of nations.

"There is no doubt that the Hague Convention has received such assent from the chief civilized States of Europe, and that it is an international law promulgated by virtue of agreement of such States."[2]

The German Supreme Prize Court in the case of the *Fenix*[3] upheld the contention of the claimants that the 6th Convention must be taken into account by the Prize Court since it was a state contract which had been ratified by the German Empire and duly published in the *Reichs-Gesetzblatt*, although for some reason, the nature of which it was unnecessary for the Court to discuss, it had not been expressly incorporated in the prize regulations. But the Court refused to consider as binding upon it a treaty concluded between the German and Swedish govern-

[1] Compare also the observations of Sir Henry Duke in the *Pellworm and Other Vessels* (IX Lloyd 170), relative to international conventions as the source of rights on the part of claimants in a Prize Court.

[2] Compare also the opinion of the Prize Court for Egypt in the case of the *Marquis Bacquehem* (V Lloyd 79; I Br. & Col. Pr. Cas. 130), where Judge Cator remarked that England had "accepted" the Hague Conventions and that it was the duty of the Prize Courts to give effect to their intention.

[3] I *Entsch.* 1; Fauchille et De Visscher, *Jur. All.*, 1; Eng. text, 10, *Amer. Jour.* 909.

ments under which certain commodities were not to be considered as contraband, and which had never been published in the *Reichs-Gesetzblatt*.[1] Furthermore the German Prize Court applied the traditional German principle that an international convention is binding upon the courts of the contracting parties only after its execution has been commanded by the proper constitutional authorities (*gesetzbefehl*).[2]

Sec. 110. The Same. Effect of "Solidarity Clause" in Hague Conventions. In Sec. 108 (*supra*), reference was made to the attitude adopted by certain belligerent governments in respect to the Hague Conventions to which some of the belligerents were not parties and which in consequence of the so-called "solidarity" clause were not binding upon any of them. It remains now to consider the attitude adopted by the Prize Courts in respect to such Conventions.

Sir Samuel Evans, president of the British Prize Court, in his early decisions involving the application of the 6th Convention, evaded pronouncing a definitive judgment on the question whether it or the others were binding, although he apparently assumed that they were and issued orders of detention against enemy ships seized in British ports at the outbreak of the war, in pursuance of the terms of the 6th Convention.

In the case of the *Chile*,[3] the first case decided after the outbreak of the war, he himself raised the question as to whether he was bound by the 6th Convention, and the Attorney-General replied that he was, since it was an "international contract," like the Declaration of Paris, which modified the common law rule. In the case of the *Marie Glaeser*,[4] decided in the same month (September, 1914), Sir Samuel observed that the question was "still undecided, but will no doubt have to be decided in the near future." It not being necessary to decide it in this case, he refrained from expressing an opinion on the question. In the case of the *Möwe*,[5] decided the following month, Sir Samuel assumed that the 6th Convention was in force and he interpreted its meaning, though he again refrained from pronouncing a definitive

[1] The *Grenland*, I *Entsch.* 185; Fauchille et De Visscher, *Jurispr. All.* 141. To the same effect see the *Svend* (II *Entsch.* 15).
[2] The *Pitea und Presto* (II *Entsch.* 116).
[3] I Lloyd 8; I Br. & Col. Pr. Cas. 1.
[4] I, *ibid.*, 56; I, *ibid.*, 38.
[5] I, *ibid.*, 70; I., *ibid.*, 60. In the case of the *Prinz Adalbert* (IV, *ibid.*, 360; II, *ibid.*, 70), Sir Samuel said he would assume for the purpose of that case, and that case only, that the 6th Convention was binding as he had done in other cases, although while the question had been elaborately argued before the Privy Council (in the case of the *Gutenfels*) it had not been definitely settled.

judgment on the question. Nevertheless, he took occasion to discuss at some length, in connection with the right of enemy claimants to appear before the Prize Court and invoke the benefits of the Hague Conventions, the effect of the "solidarity clause" to which he said he could not close his eyes. Adverting to the fact that certain of the belligerents were not parties to the 6th Convention, he said:

"It is not my function or province to do anything more than to declare the law. But I trust to be forgiven for a humble expression of opinion that it would accord with the traditions of this country if such steps were taken as may be necessary to make operative a series of Conventions solemnly agreed upon by the plenipotentiaries of forty-five States or Powers after most careful deliberation, with the most beneficent international objects. . . . Of the belligerents, Montenegro has no navy, and, so far as I know, no mercantile marine; it has a coastline, but only of about thirty miles; and Serbia is a purely inland State, having no seaboard at all. It would scarcely seem desirable that the non-ratification by these Powers should prevent the application of the maritime Conventions; and it may be that the counsellors who have the responsibility of advising the Crown may deem it fit to advise that by proclamation or otherwise this country should declare that it will give effect to the Conventions, whether by the literal terms hereof they are strictly binding or not."

As stated above (Sec. 109), the Prize Court for Egypt in the case of the *Bärenfels,* both judges concurring, stated emphatically that in their opinion the 6th Convention, notwithstanding its non-ratification by certain belligerents, was a part of the law of nations and therefore binding on the Prize Court.

In various cases the Prize Courts assumed that the 11th Convention was binding but since the provisions invoked by the claimants were held to be inapplicable to the vessels claimed it was not necessary to pronounce definitively upon the question as to whether it was binding.[1] Likewise the 10th Convention was assumed by Sir Samuel Evans to be binding, but since its terms did not protect against capture the vessel claimed, a definitive decision on the question of its binding effect was unnecessary.[2]

The question of the status of the Hague Conventions came before the Judicial Committee of the Privy Council in March-April, 1916, in the case of the *Gutenfels* [3] and other vessels, on appeal from the Prize Court for Egypt. Their Lordships agreed to assume that the 6th Convention was in force and that it ap-

[1] Notably the *Berlin* (II Lloyd 43; I Br. & Col. Pr. Cas. 29); and the *Simla* (III, *ibid.*, 384; I, *ibid.*, 281).
[2] The *Ophelia* (III, *ibid.*, 13; I, *ibid.*, 210).
[3] IV, *ibid.*, 336; II, *ibid.*, 36.

plied in the case before them, though they found it unnecessary to decide the question. Finally, the question again came before the Judicial Committee after the close of the war (February, 1922), in the case of the *Blonde, Hercules,* and *Prosper*[1] and their Lordships found that it was still unnecessary to determine the effect of the "solidarity" clause, for the reason that the Crown from the outset had never invoked the clause against the application of the Convention but had again and again asked for orders of detention in pursuance of the terms of the Convention, and they were so made; that the correspondence between the British and German governments immediately after the outbreak of the war showed an intention on the part of both governments to observe the Convention; and that the British government had throughout the war treated the Convention as binding. Adverting to the non-ratification of the Convention by certain belligerents and the effect thereof, Lord Sumner said:

"Of the Powers belligerent in some theatre or other and against one combination of opponents or another during the late war, Serbia and Montenegro never ratified the Convention in question. The United States were not parties to it at all. At the time when the ships now under discussion were first detained, Germany had not declared war on Serbia, nor had Serbia become formally the ally of Great Britain, and, so far as their Lordships are aware, actual hostile action by Germany against Serbia and actual military support to Serbia by Great Britain both belong to later stages in the war. A nice question arises, therefore, whether Serbia was a belligerent in such a sense that her failure to ratify the Convention prevents its being applicable between Germany and Great Britain in the matter of these ships? If the position of Serbia does not prevent the obligations of the Convention from attaching, still less can this result from that of the United States, who were not one of the 'contracting powers.' To put the point otherwise, are the 'belligerents,' who are to be taken into account for the purposes of this article, the belligerents merely who detain or suffer detention, or are they all the Powers who are simultaneously engaged in war, whether acting in alliance or in direct conflict with one another or not? Is the adherence of all the belligerents, however remote from each other or unconnected with the ships and their detention, the consideration for the attaching of the obligation of any one of them, or are the mutual promises of the Powers concerned—that is, of the detainer and the detained—a sufficient consideration to bind them both together? Mutuality is of the essence of the Convention. Is that mutuality complete if the detaining Sovereign and the Sovereign of the ships detained, ratify and abide by the Convention, or is it imperfect so as to prevent the application of the Convention, unless and until other Powers, in no way concerned in the ships or their fortunes, but merely connected with one or both of those Sovereigns in the general war, have likewise ratified and likewise abided by the Convention,

[1] X, *ibid.*, 246; III, *ibid.*, 1031.

whether or not they have ships or harbours, and whether or not they make or suffer captures, or are ever directly affected by maritime war at all?

"It is very hard to credit that the operation of an agreement so earnestly directed to the attainment of the highest practical ends in war, should have been deliberately made to depend on the accidents or the procrastinations of diplomatic procedure in time of peace, even when no real relation existed between the condition and the consequence, between the ratification of all the parties and the detention of the ships of one of them. Their Lordships, however, have not found it necessary to give a final answer to these questions. Whether, in the circumstances of these cases, the Convention was applicable, or whether it might be successfully objected that it had never become applicable, the result is the same, for the objection is clearly one that can be waived, and in their Lordships' opinion it was waived by His Majesty's Government, alike by the whole tenor of the above-mentioned correspondence and by the whole attitude of the Crown in matters of prize affecting such cases as these throughout the war. *De facto* as well as *de jure,* the position of Serbia and the other Powers, as regards both the Convention and the conduct of the war, was well known to His Majesty's Government at all material times. Yet days of grace were in fact allowed to Austrian ships by proclamation dated August 15, 1914, as to which see the *Turul.* The *Chile* order was wholly inept if the Convention had and could have no application, and the Crown should have applied to the Court, not for leave to requisition, but for decrees of condemnation. The fact that in spite of the doubt expressed by Sir Samuel Evans, P., in the *Möwe* the Crown acquiesced in numerous orders in that form, and never asked for condemnation of these detained ships so long as hostilities lasted, is conclusive to show that any right to rely on the non-fulfilment of article 6 was waived. The arguments of the Attorney-General on behalf of the Crown in the case of the *Gutenfels* and *H. M. Procurator in Egypt v. Deutsches Kohlen Depôt Gesellschaft,* are of especial importance in this connection."[1]

The German Supreme Prize Court likewise interpreted the "solidarity" clause in the 6th Convention to mean that the convention was inapplicable only when the non-ratifying belligerents were maritime states. Thus in the case of the *Fenix,*[2] it said:

"Finally, the circumstance that the belligerent states Serbia and Montenegro did not ratify the Convention raises no doubt, for the reasons advanced by the claimants, concerning its applicability to the case under review; but it may be left undecided whether the dispositions of the Convention would not have to be taken into consideration as generally acknowledged principles of international law, even if they were not brought into question by virtue of a treaty."

[1] Further discussion of this case, Secs. 111, 221 *infra.*
[2] I *Entsch.* 1; Fauchille et De Visscher 1.

But as regards the solidarity clause in the 11th Convention, it observed that the question remained unsettled whether the convention could be invoked against Germany in the existing war in which Russia and Italy were belligerents, neither of which had ratified the convention.[1] As already stated, the German government had in March, 1917, announced that it would not regard the Convention as applicable, in consequence of which the Prize Court of Siam refused to accord the benefits of the Convention to the owners of German merchant vessels seized in the ports of Siam at the outbreak of the war.[2]

Sec. 111. The Same. The Principle of Reciprocity. British Decisions. In a number of cases the Prize Courts were called upon to decide whether they were bound to apply a Convention and accord the benefits thereof to an enemy claimant when his own government, while having ratified the Convention, had failed or refused to observe its stipulations. In the cases of the *Chile* and *Bärenfels* the Crown suggested that perhaps the German government might not observe the terms of the 6th Convention and refrain from confiscating British merchant vessels seized at the outbreak of the war, in German ports, in which case Great Britain might decline to abide by the Convention. Judge Cator of the Prize Court for Egypt, adverting to this suggestion, said in the case of the *Bärenfels:* [3]

"Be it so. It is quite true that the rules of international law are not immutable. In the last resort they depend on reciprocity. This is peculiarly the case in regard to prize law, and if the Crown could produce evidence that Germany had flagrantly broken her bargain respecting the treatment of British ships, I conceive that we should be justified in moulding our practice according to her example. But the mere suspicion that she will break her word ought not to affect our judgment now. Having once come to the conclusion that the Convention applies, I am of opinion that we must give the ship the fullest benefit to which she is entitled under it. The Crown has no right to ask for a suspension of our decision in order to see how Germany will act. Suspicion begets suspicion; and if one party does not loyally perform its duties under an agreement there is great danger that the pact may be broken by the other side, and a war of reprisals once begun there is no setting a bourne to their extent. In this war we claim and believe that we are fighting to uphold the sanctity of treaties, and it lies with us to maintain this great principle, even though its maintenance should demand a much heavier sacrifice than the value of any ships which may have been detained in our ports."

[1] The *Köningen Regentes* (II *Entsch.* 242).
[2] The *Chantaboon, Patrieu* and other vessels (Oct. 18, 1917). Text of the decision in 46 Clunet (1919) 428.
[3] IV Lloyd 336; I Br. & Col. Pr. Cas. 122.

In the case of the *Gutenfels* [1] where the question involved was whether article 2 of the 6th Convention was applicable, the Judicial Committee observed that the question was "one of law arising on an international document involving a responsible obligation performable only at the end of the war" and that if their Lordships were to determine at that time the question of construction, Germany might thereafter take a different view, in which event the reciprocal performance of the obligation might become impossible. Under these circumstances the construction contended for, involving, as it did, a reciprocal obligation performable only at the end of the war, could not then be determined in the absence of knowledge as to the future attitude of the respective belligerents in regard to the observance of the convention.

In the case of the German hospital ship *Ophelia* [2] where the Crown case for condemnation was based on the 10th Convention, Sir Samuel Evans said he would deal with the case on the basis of that Convention, "avoiding all inquiry as to whether the government of the German Empire is or is not precluded by its conduct of the present war from invoking the aid or protection of the 10th or any other of the Hague Conventions." But in the case of the *Germania* [3] Sir Samuel intimated that he considered reciprocity of observance essential. He said:

> "Assuming for a moment that this vessel is within the Hague Convention, I am not sure that a serious question may not arise some day whether Germany can complain of anything that is done in violation of the Hague Convention. An agreement, whether made between individuals or States, must be observed by both sides, and some one may have to determine whether Germany has so far adhered to the Hague Convention that she can call upon any other party to observe it."

Even after the close of the war when the facts of Germany's conduct in respect to the observance of the Hague Conventions were a matter of record the Prize Court at London avoided a decision on the question as to whether Germany's violations of the Convention were such as to disentitle German subjects from the benefits of the Conventions, such as opinion being unnecessary to the judgment.

In the case of the *Marie Leonhardt*,[4] decided in October, 1920, and involving the question whether German ships seized in Brit-

[1] IV Lloyd 336; II Br. & Col. Pr. Cas. 36.
[2] III Lloyd 13; I Pr. & Col. Pr. Cas. 210.
[3] IV, *ibid.*, 237; I, *ibid.*, 577.
[4] X Lloyd 178; III Br. & Col. Pr. Cas. 761.

ish ports at the outbreak of the war were liable to confiscation, the Crown argued that in view of the solidarity clause and of Germany's flagrant violations of the Hague Conventions throughout the war, German nationals were not entitled to claim the benefits of the 6th Convention. Adverting to the affidavits which had been read and which "set out in an appalling catalogue the horrors inflicted during the war by Germany upon belligerents and neutrals, combatants and non-combatants," Sir Henry Duke said it was not necessary for him to decide whether in these circumstances Germany had forfeited the right of her nationals to invoke the benefits of the 6th Convention, since no rights were in fact asserted by the claimant under this Convention and the claim could be disposed of by a decision on the point as to whether there was any rule of international law under which enemy ships found in port at the outbreak of war were entitled to leave immediately or after days of grace.[1] In the following year (Jan. 1921) the same contention was put forward by the Crown in the case of the *Blonde, Hercules,* and *Prosper,*[2] three German merchant vessels seized in a British port at the outbreak of the war and against which orders of detention had been issued and of which the Crown now claimed condemnation. Again Sir Henry Duke held that it was unnecessary for him to decide the question as to whether the benefits of the 6th Convention had been forfeited by Germany on account of her violations of this and the other conventions. He added:

"When it comes up to be judicially determined—if it ever should—the observations of Marshall, C. J., and Johnson, J., in the *Nereide,* to which counsel for the claimants referred, will, I doubt not, receive the consideration to which they are entitled by reason of the great eminence of the authorities from whom they proceeded, and the tremendous gravity of the principles which those learned judges enunciated. I say no more on that topic. I am glad to be at liberty to deal with this case upon much narrower grounds."

But on appeal the Judicial Committee[3] finally pronounced a definitive judgment on the question, which the Prize Court from the first had managed to avoid, reversed the decision of Sir Henry Duke and held that as the British government had treated the Convention throughout the war as binding, although it had not been ratified by all the belligerents and although Germany had

[1] See further discussion of this case, Sec. 200 *infra.*
[2] C., X Lloyd 225; III Br. & Col. Pr. Cas. 875.
[3] *Ibid.,* 246; *ibid.,* 1031.

repudiated many of her obligations under it, it did not follow that she ever intended to repudiate the Convention as such, it must be regarded as binding upon the Prize Court and the decrees of condemnation must be set aside. Lord Sumner speaking for the Judicial Committee thus stated and disposed of the argument of the Crown:

"Finally, it was contended that the many outrageous and indefensible measures adopted by Germany during the war, and especially her defiance of the Hague Conventions applicable, notably by the use of poisonous gas and of contact mines, by the destruction of hospital ships, the deportation and forced employment of civilians, and the bombardment of open towns, amounted to an intimation that she intended to repudiate all obligations, and especially all conventional obligations, as to the conduct of war, and thus gave Great Britain the right to treat herself as released from her correlative obligation under Convention VI. There are two obvious flaws in this argument. First, so far as concerns the intentions of Germany, she may have flagrantly disregarded obligations which fettered her freedom of action to her disadvantage. It does not necessarily follow that she intended to repudiate a convention under which she stood to gain largely in the long run. There is, in fact, no evidence of any conduct on Germany's part down to the conclusion of the Armistice which put it out of her power to return detained ships in pursuance of article 2. Secondly, so far as concerns the consequent rights of this country, even if the rules of English municipal law as to the discharge of dissolution of contracts be applicable to a case arising between Sovereign Powers, repudiation by Germany could do no more than give to this country the right to accept that repudiation, and to treat the Convention as no longer binding. There is no evidence whatever that this was ever done; indeed it is plain that His Majesty's Government continued, down to the conclusion of hostilities and even to the conclusion of peace, to treat this Convention as binding. Most, if not all, of the *Chile* orders had been made by the end of 1916, since which date, as well as before it, most of the facts now relied upon were notorious, yet no step was taken to obtain a 'further order' in any case, and it is to be observed that the reason for making provision for a 'further order' was not doubt as to the declared intentions of Germany with regard to recognition of the Convention, but uncertainty as to the continuance of that intention on her part. If so, in the language of the English cases, the contract was kept alive for the benefit of both parties, since one party cannot of his own choice put an end to it by disregarding its obligations, and, so long as the contract subsists each party can claim the fulfilment of the provisions which are in his favor, just as he remains bound to answer for his disregard of obligations which he ought to satisfy.

"Their Lordships, however, do not rest their conclusions on rules applicable to private contracts in English Courts. They prefer a wider ground. It is not the function of a Court of Prize, as such, to be a censor of the general conduct of a belligerent, apart from his dealings in the particular matters which come before the Court, or to sanction disregard of solemn

obligations by one belligerent, because it reprehends the whole behaviour of the other. Reprisals afford a legitimate mode of challenging and restraining misconduct, to which when confined within recognised limits and embodied in due form, a Court of Prize is bound to give effect. In a matter, however, which turns on the obligations of a single and severable compact, the Court must inquire whether that very compact has been discharged, and ought not to be guided by considerations arising only out of the general conduct of war."[1]

The line of reasoning of their Lordships based on the view that because Germany had flagrantly disregarded a convention which was against her interests, it did not follow that she intended to repudiate one from which she stood to gain an advantage and that her violations of the other conventions could not be taken into account in determining whether she was entitled to the benefits of the 6th Convention, the only one which it was to her interest to observe, has been criticized as illogical and their view as to flaw number two in the argument of counsel has been characterized as representing a "narrow and municipal way of looking at the question."[2]

Sec. 112. The Same. French, Siamese, and Belgian Decisions. The French Prize Council in deciding the question as to whether Germany was entitled to the benefit of article 3 of the 6th Hague Convention relative to the immunity from capture of enemy merchant vessels which have left their last port of departure before the commencement of hostilities and which are encountered at sea in ignorance of the existence of hostilities, to which article Germany had reserved her ratification, held that the article rested on the principle of reciprocity and Germany was not therefore entitled to invoke its benefits for her nationals. This was true even though the act of the French Parliament by which the Declaration was put into effect and the instructions of the Minister of Marine relative to its execution did not expressly mention the German reservations to the article.[3] As stated above, the Prize Court of Siam held that international conventions are obligatory only when their observance is reciprocal. Consequently the German government having notified the Siamese legation at Berlin on March 30, 1917, that it did not regard the 11th Convention as applicable during the existing war, because of its non-ratification by a number of belligerents, and in particular Russia and Italy, German nationals were not entitled to invoke its

[1] See further discussion of this case, Sec. 221 *infra*.
[2] Higgins, "Enemy Ships in Port at the Outbreak of War," *Br. Year Bk. of Int. Law*, 1922-23, esp. pp. 72-73.
[3] The *Porto*, Fauchille, *Jurispr. Franc.* 183.

benefits. The court added that this was equally true of the 6th Convention which was the one actually invoked in the present case, since the solidarity clause which it contained was identical with the corresponding clause in the 11th Convention.[1]

In several cases the Belgian Prize Council in pronouncing condemnation of German vessels captured in Belgian ports at the outbreak of the war remarked that it was not necessary to examine the question whether Germany had violated the stipulations of the 6th Convention which she had ratified and whether she was entitled to invoke its benefits.[2]

Sec. 113. Attitude of the Prize Courts in Respect to the Declaration of London. Source of Its Validity. The question of the application of the Declaration of London by the Prize Courts assumed three forms: (1) Whether the instrument as a whole was binding, (2) whether certain of its prescriptions constituted departures from or innovations upon the customary rules of international law and (3) whether the General Report of the drafting committee should be taken into account in interpreting its provisions.

As to the first question, the Prize Courts were apparently in agreement that whatever obligatory force the Declaration possessed it was derived not from the formal character of the instrument itself, since it had never been ratified by any of the belligerents, nor even from the assertion in the preamble that its provisions corresponded in substance with the "generally recognized principles of international law," but solely from the national decrees. and orders by which it was put into effect. Thus the British Prize Courts again and again asserted that the Declaration was binding upon them only in virtue of the Orders in Council by which it was put into force and then only subject to the alterations and additions which they introduced. The supreme court of the Straits Settlements in March, 1915, stated that it was willing to assume that the Declaration was binding upon the Court although it expressly remarked that it was not deciding this point.[3] Sir Samuel Evans, in the case of the *Kim*,[4] stated emphatically that the Declaration never having been ratified it was applicable only in so far as it derived validity from Orders in Council and the Judicial Committee in the case of the

[1] The *Samsen* and other vessels, 45 Clunet 1316; the *Chantaboon* and other vessels, 46 Clunet 428.
[2] The *Minna* (47 *Rev. de Droit Int. et de Lég. Comparée* 138); the *Ferronia* (*ibid.*, 271); and the *Elbing, Hanau and Tasmania* (*ibid.*, 277).
[3] The *Pontoporos* (I Br. & Col. Pr. Cas. 371).
[4] III Lloyd 187; I Br. & Col. Pr. Cas. 405.

Louisiana[1] stated that Parliament having refused to consent to its ratification it never became binding upon Great Britain, except in so far as it was adopted by His Majesty for the existing war with certain additions and modifications. Again in the case of the *Hakan*[2] their Lordships stated that the Declaration had "no validity as an international agreement."

The French Prize Council adopted the same view and held that the Declaration never having been ratified by France but having been put into effect, with certain reservations, by a decree of August 25, 1914, it was subject to these reservations, binding only as an internal unilateral act of France and as such it belonged to the Prize Council to interpret its meaning and weight.[3]

Considering the traditional attitude of the German Prize Courts in respect to the superior binding effect upon them of national prize regulations as over against international conventions, it was inevitable that they too should have denied any validity to the Declaration of London except that which was derived from its incorporation in the prize regulations. It would be useless, said the Court, to discuss the question whether the placing of certain articles by the German government on the list of absolute contraband was or was not in conformity with international law and especially the Declaration of London.

Since the Declaration had never been ratified the German Prize Courts were bound only by the prize regulations.[4]

The Prize Court of Austria-Hungary recognized as binding upon it those provisions of the Declaration of London which had been incorporated in the prize regulations but refused to apply those from which derogations had been made by the prize regulations.[5]

Sec. 114. The Same. Relation of Declaration of London to International Law. Since the British Prize Courts treated the Declaration of London as deriving its validity from the Orders in Council by which it was put into effect and since such Orders were sustained as valid only when they did not derogate from the rights of neutrals as those rights are defined by the law of nations, they were sometimes called upon to determine whether such provisions of the Declaration as had been put into effect

[1] V, *ibid.*, 248; III, *ibid.*, 60. [2] V, *ibid.*, 186; II, *ibid.*, 483.
[3] The *Federico* (Fauchille, *Jurispr. Franc.*, 19) and the *Dacia* (*ibid.*, 94).
[4] The *Prins Hendrik* (1 *Entsch.* 321; Fauchille et De Visscher, *Jurispr. All.* 242).
[5] The *Kephalonia* (*Normal Verordnungsblatt für die K. U. K. Kriegsmarine*, April 30, 1917, p. 204); the *Caledonia* (*ibid.*, July 20, 1918, p. 213) and the *Stjernborg* (*ibid.*, 21).

by Orders in Council were or were not in conformity with the preëxisting customary rules of international law. As stated above, the preamble to the Declaration contained a statement to the effect that the signatory powers were agreed that its rules correspond in substance with the generally recognized principles of international law. But this assertion was not meant to imply that the Declaration was merely a conventional statement of the preëxisting customary law but rather a formulation in accordance with generally recognized principles, of uniform and definite rules in the place of the hitherto vague and divergent usages.[1] The General Report accompanying the Declaration stated more accurately the effect, when it declared that "the purpose of the conference has been, above all, to note, to define, and, where needful, to complete what might be considered as customary prize law." In any case, the Declaration was a solemn expression of what the signatories deemed to be international law on the matters with which it dealt.

Sir Samuel Evans in interpreting the rules of the Declaration respecting the doctrine of continuous voyage stated that they represented a "compromise" when they recognized the doctrine in the case of absolute contraband and denied it in the case of conditional contraband, and as regards the latter, the rule of the Declaration constituted an innovation upon the existing customary law and practice.[2] In the case of the *Louisiana*[3] the Judicial Committee referred to the Declaration as a "provisional agreement embodying certain somewhat sweeping changes in international law." It, too, evidently considered article 35 which abrogated the doctrine of continuous voyage in the case of conditional contraband as such an innovation. Adverting to the fact that the Order in Council of August 20, 1914, adopting the Declaration for the period of the existing war, with certain additions and modifications, it stated that the effect of one of the modifications was to "neutralize" article 35 and to restore the doctrine of continuous voyage in respect to conditional contraband, "as it had been before the war." Similarly, in the case of the *Alwina*[4] Sir Samuel held that the rule of the Declaration (art. 38) that a vessel may not be captured on the ground that she has carried contraband on a previous occasion, was likewise an innovation upon the existing law. The rule had in fact been

[1] Compare Bentwich, *The Declaration of London*, p. 9.
[2] The *Kim and Others*, III Lloyd 167; I Br. & Col. Pr. Cas. 405.
[3] V, *ibid.*, 248; III, *ibid.*, 60. See also Sec. 419 *infra*.
[4] V, *ibid.*, 127; II, *ibid.*, 186.

modified by the Orders in Council of August 20 and October 29, 1914, and he held that since the Orders did not enlarge but, if anything, mitigated the rights of the captor, they were not invalid. In the case of the *Hakan*[1] the Crown relied upon article 40 of the Declaration of London as adopted by the Order in Council of October 29, 1914, which provided that a vessel carrying contraband might be condemned, if the contraband, reckoned by value, weight, volume, or freight formed more than half the cargo, and the article was cited as showing a consensus of the most important maritime nations as to the proportion of contraband cargo, which apart from aggravating circumstances, a neutral ship might carry without rendering herself liable to condemnation. Lord Parker, speaking for the Judicial Committee, said in regard to this contention:

"It is, of course, quite clear that if article 40 of the Declaration of London be applicable the ship was rightly condemned, inasmuch as the whole cargo was contraband. The Declaration of London has, however, no validity as an international agreement. It was, it is true, provided by the Order in Council of October 29, 1914, that during the present hostilities its provisions should, with certain very material modifications, be adopted and put in force; but the Prize Court cannot, in deciding questions between His Majesty's Government and neutrals, act upon this Order, except in so far as the Declaration of London, as modified by the Order, either embodies the international law or contains a waiver in favour of neutrals of the strict rights of the Crown. It is necessary, therefore, to consider the international law with regard to the condemnation of a ship for carrying contraband, apart from the Declaration of London."

After examining at length the authorities, their Lordships came to the conclusion that the vessel was condemnable according to the existing law of nations, apart from the Order in Council, and that the Order in Council adopting it was a mitigation of the rule of the law of nations in favor of neutral rights and was therefore valid.

The German Prize Court, like those of Great Britain, held that various articles of the Declaration were not simply declaratory of the preëxisting customary law but embodied new principles.[2]

Sec. 115. The Same. Rôle of the General Report in the Interpretation of the Declaration of London. As is well known the Declaration of London was accompanied by a general report

[1] V. *ibid.*, 186; II, *ibid.*, 479 (affirming the judgment of Sir Samuel Evans).

[2] For example, the *Davanger* (1 *Entsch.* 232; Fauchille et De Visscher, *Jurispr. All.* 182).

prepared by the drafting committee of which M. Renault was chairman and which undertook to interpret and elucidate the text. It purported to be "an exact and non-controversial commentary" which, when approved by the conference, would become an "official commentary" and would serve as "a guide to the different authorities—administrative, military and judicial, who may be called on to apply it." The exact import of certain provisions of the Declaration could be determined only from the explanation which the Report furnished thereon [1] and by reason of the learning and high authority of the eminent jurist who drafted the Report it was bound to carry weight with the Prize Courts which took it into consideration. The Report appears to have been "accepted" by the conference at its plenary session on February 28, 1909, and consequently was approved as an authoritative and correct interpretation of the provisions of the Declaration. During the subsequent discussion of the Declaration in England the legal effect of the Report in its bearing upon the Declaration became a subject of controversy among English jurists, Professor Holland and others maintaining that it had no authoritative character, that it was nothing more than an expression of opinion on the part of the delegates, that so far as the governments were concerned it was *res inter alios acta* and that consequently it could not be regarded as an officially binding interpretation of the provisions of the Declaration.[2] Professor Westlake, on the other hand, maintained that the Report having been prepared by a committee of the conference and approved by the conference, it represented the opinion of the conference as to the meaning of the Declaration and that consequently its rules must be interpreted in the light of the Report.[3]

The British delegation in its report to their government, reasoning from "the principles and practice of continental jurisprudence," likewise expressed the opinion that the Report should be considered as "an authoritative statement of the meaning and intention of the instrument which it explains and that consequently foreign governments and courts, and, no doubt, also, the international Prize Court, will construe and interpret the provisions of the Declaration by the light of the commentary given in

[1] For example the interpretation which the Report gave of Article 17 relative to the blockade area in which neutral vessels could be captured, and Article 45, relative to the transportation of persons incorporated in the armed forces of the enemy.

[2] Holland, *Letters upon War and Neutrality* (ed. 1914), p. 188. Compare also Cohen, the *Declaration of London*, p. 13, and Bentwich, *op. cit.*, p. 8.

[3] Westlake, *Collected Papers on International Law*, pp. 654, 667, 670.

the Report." This view was also adopted by the foreign office [1] and the Order in Council putting the Declaration into effect with certain modifications and additions at the outbreak of the war laid down as one of the conditions under which it would be applied that the Report should be considered by the Prize Courts as an authoritative statement of the meaning and intention of the Declaration. In fact many of the arguments advanced in England against certain provisions of the Declaration would have lost much of their force had it been certain at the time that the Prize Courts would be bound to apply its rules as they were interpreted by the Report.

The British Prize Courts in conformity with the injunction of the Order in Council putting the Declaration into effect accordingly interpreted the provisions of the Declaration in the light of the Report. Thus the Prize Court of Bermuda in interpreting the effect of the rules of the Declaration relative to the transfer of flags, observed that "the general Report of the Naval Conference held in London in 1909, is instructive on this point.[2]

So the Prize Court of St. Lucia, adverting to the want of clearness in the phraseology of article 46 relative to the liability to condemnation in certain circumstances of neutral merchant vessels, remarked: "but, just as the meaning of an impressionistic picture is explained on reference to the catalogue; so the intention of paragraph 3 becomes obvious when you read the official commentary." [3]

When the report failed to throw light on the intent of a particular rule the meaning of which was not clear, the British Prize Courts even took into consideration the discussions of the Conference on the point in question. Thus the judge of the Prize Court of St. Lucia adverting to the circumstance that the official report threw no light on the question as to whether the language of article 40 relative to the condemnation of a vessel carrying contraband the quantity of which constituted more than half the cargo was merely permissive, as the claimants contended, or whether it was obligatory as the Crown argued, said: "But I have learned in this colony that, for the interpretation of a code, recourse may be had to the deliberations of the codifiers who, unlike members of Parliament, are presumed to have expert knowledge of the matters which they discuss. And upon reading the *Proceedings of the International Naval Conference*, the inten-

[1] *Parliamentary Papers*, Cd. 5418, p. 21.
[2] The *Leda* (I Br. & Col. Pr. Cas. 233).
[3] The *Thor* (*ibid.*, 229).

tion becomes reasonably clear."[1] Similarly Sir Samuel Evans concluded in the case of the *Jeanne*[2] that "it was clear from the deliberations of the representatives of the various powers at the International Naval Conference, held in London in 1908-09, that it was assumed that freight was never payable in respect of contraband."

The German Prize Courts likewise in interpreting such of the rules of the Declaration as had been incorporated in the German prize ordinance had recourse to the General Report, the reports of special committees, the deliberations of the Conference and even to the memorandum laid before the Conference by the governments represented.[3] Thus in the case of the *Cubano*[4] the Prize Court adverting to article 56 which it interpreted as not prohibiting *all* transfers of vessels from enemy to neutral flags made after the outbreak of war, said "the proof is furnished by the report of the commission at the plenary session of the conference where it was said to be too rigorous to declare invalid all transfers made since the beginning of the war and that it was reasonable to admit proof to the contrary—the report of the commission, like the general report of the conference, refers to a single case only of a like refutation of the presumption."

The Austro-Hungarian Prize Court likewise relied upon the general Report in its interpretation of the Declaration[5] and so did the Italian Prize Commission.[6] In the case of the *Federico*[7] the owners of a neutral vessel which had been condemned by the French Prize Council for the transportation of persons "incorporated in the armed forces of the enemy" in the sense of article 45 of the Declaration appealed to the Council of State, basing their appeal upon the interpretation placed upon the article by the general Report, to the effect that only enemy persons who had been called to the colors and who had actually joined their corps were to be considered as being "incorporated in the armed forces" and not those who had merely embarked on a vessel with a view to returning to their country. The French government having put the Declaration into effect by a decree of August 25, 1914,

[1] The *Lorenzo* (*ibid.*, 226). [2] V Lloyd 293; II Br. & Col. Pr. Cas. 302.
[3] See among others the cases of the *Glitra* (I *Entsch.* 34), the *Sydney Albert* (I, *ibid.*, 62), the *Vega* (I, *ibid.*, 80), the *Indian Prince* (I, *ibid.*, 87), the *Zaanstroom* (I, *ibid.*, 118), the *Assistent* and *Undine* (I, *ibid.*, 150), the *Neguri* (II, *ibid.*, 296), the *Pitea* and *Presto* (II, *ibid.*, 116).
[4] I, *ibid.*, 203.
[5] The *Fiore del Mare*, *Normal Verordnungsblatt*, 1914, p. 59, and the *Firenze*, 1915, p. 131.
[6] The *Kyzicos*, Fauchille et Basdevant, *Jurispr. Ital.*, 57.
[7] Fauchille, *Jurispr. Franc.* 287.

the article, they argued, must be applied in the sense attached to it by its authors. The appeal was rejected and the condemnation of the vessel sustained on the ground that the terms of article 45 were "clear and precise" and could not be invalidated by recourse to "any other document." [1] Whether in case there had been doubt in the opinion of the Council of State as to the meaning of the article it would have had recourse to the interpretation of the authors of the general Report, cannot be determined.[2] It is quite certain that the British and German Prize Courts would have done so. The Council of State proceeded on the principle laid down in other cases that the Declaration was for France a unilateral act the interpretation of which belonged solely to the Prize Courts.

II

Application of Principles of Customary International Law

Sec. 116. British Doctrine of Precedents. It is an elementary principle of English prize law that a Prize Court is bound by its own previous decisions, unless there has been a change in international law to which Great Britain has given her assent, expressly or tacitly, or unless deviation from the precedents is necessary to adapt established principles to altered circumstances and conditions.[3] In the absence of binding decisions or positive municipal enactments the Court must revert to the general practice and opinions of nations as evidenced in unilateral acts, declarations of statesmen, treaties, decisions of foreign courts, opinions of text writers, etc. And unlike the practice of the common law courts where the existence of a rule of international law and the fact of its acceptance by England must be proved by satisfactory evidence as though it were a rule of foreign law, a Prize Court will take judicial notice of a rule of international law, as the common law of the Court, in the absence of positive evidence.

[1] See infra Secs. 445, 449.

[2] But in the case of the *Dacia* (*infra* Secs. 313, 314), the French Prize Court relied in part upon the Report as ground for condemnation of the vessel.

[3] The *Henrick & Maria*, 4 C. Rob. 61, 63 (1799). The *Roland* (II Lloyd 253), the *Odessa* (I Br. & Col. Pr. Cas. 559), the *Berlin* (I, *ibid.*, 36), Pyke, 32 *Law Qu. Review*, pp. 164, 166; Westlake, *Collected Papers*, p. 516.

In their search for guiding principles the British Prize Courts rely, first of all, upon judicial precedents, that is, upon the reported cases in which the question at issue has previously been considered and in which an opinion has been expressed or a judgment pronounced.[1] Cases were not lacking during the late war where, when no reported decision covering the particular point at issue could be found, a search of the public record office was made for decided cases which had not been reported and published in the collections of prize cases, and sometimes the search was successful and the court was able to base its decision upon precedent.[2] When a decision is found and is shown to have clearly pronounced on the question at issue it is generally regarded as conclusive and is followed by the Prize Court even when the conditions of the time when it was rendered were wholly different from those prevailing when the Court was later called upon to follow it. This reliance upon the precedents, and especially upon the decisions of Lord Stowell, distinguished the attitude and policy of the British Prize Courts from those of other countries.[3]

Sec. 117. Views of the British Prize Courts. In consequence of the many new and novel questions which came before the Prize Courts during the late war and the changed conditions under which the law of prize had to be applied [4] exact precedents were naturally sometimes lacking and there were no conventional rules applicable, in which case the Court had recourse to the views of the authorities on the principles of equity. Thus in

[1] As stated above, the Prize Courts are of course bound by the decisions of the Judicial Committee (The *Parchim*, IV Lloyd 375), and in cases where their Lordships overruled the Prize Court the latter conformed its subsequent decisions to the view of the court of appeal. (The *Alwina*, V Lloyd 127 and the *Hakan*, V, *ibid.*, 161.) But one British Prize Court is not bound by the decisions of another (The *Batavier II* and *Batavier VI*, VI Lloyd 392, and the *Caboto* and the *Dandolo*, II Br. & Col. Pr. Cas. 339). The Judicial Committee treated its earlier decisions as binding upon it (The *Düsseldorf*, IX Lloyd 12) and very rarely departed from them. In the case of the *Elve* and the *Bernisse* (1919) (IX Lloyd 243), however, it disapproved the decision of their Lordships in the *Luna* (1810).

[2] Among others, see the *Abonema and Other Vessels*, VIII Lloyd 284.

[3] As to the influence of Lord Stowell's decisions upon the British Prize Courts during the late war see Roscoe, *Lord Stowell, His Life and the Development of English Prize Law* (1916), ch. VII. When Lord Stowell became judge of the Prize Court there was no ascertainable body of prize law in England. It consisted mainly of a "mixture of meager and fragmentary reports and professional tradition and of judicial opinion." As a result of his genius England alone of the European powers at the end of the Napoleonic wars possessed a "clear code of prize law binding henceforth upon the successors of this eminent jurist." Roscoe, *Growth of English Law*, pp. 134-6.

[4] Compare as to this the remarks of Sir John Simon in the case of the *Chile* (I Br. & Col. Pr. Cas., pp. 3 ff.).

the case of the *Juno* [1] Sir Samuel Evans remarked: "As regards freight under such circumstances there is no case in the books and the question appears to be as to what is equitable." But the Prize Court refused to be guided by considerations of "heavy loss" when the rule of law did not warrant it.[2]

In the case of the *Düsseldorf* [3] the Judicial Committee discussing the question as to whether a neutral government was entitled to damages on account of a seizure in its territorial waters through *bona fide* mistake, remarked that it was bound "to act judicially, and to follow legal principles and the decisions already given in prize cases," but it was obliged to confess that "the authorities prior in date to the recent war are few in number and somewhat indeterminate." So in the case of the *Heim* [4] Lord Sterndale had to say "There is no case, so far as I am aware, in which a claim for damages and demurrage has been allowed as a charge against the goods." In the case of the *Proton* [5] Judge Cator of the Prize Court for Egypt said: "it may be that the books yield no precedent which is exactly in point, but I am satisfied that the decision is warranted by the principles to be extracted from a long line of authority and it is certainly in harmony with the rules agreed upon by the parties who signed the Declaration of London."

In the case of the *Gothland* [6] Sir Samuel Evans referring to a "new point" made by counsel in support of a claim by the insurers, said: "There is no precedent for such a claim." In the case of the *Rio Janeiro* [7] which involved a claim by certain shipowners for damages due to the diversion of the ship, Lord Sterndale was evidently embarrassed by a decision of his predecessor, Sir Samuel Evans, in the case of the *Gorontalo* [8] where damages of this kind had been allowed and which decision according to English practice was binding upon him. Nevertheless, he found that the circumstances of the two cases were not exactly identical, so that he was able to disallow the claim without abandoning the rule of *stare decisis*. In the case of the *Leonora* and other vessels [9] Sir Samuel Evans, asking himself whether there were "any precedents or decisions or any authority apart from actual decision or precedent, in support of or against

[1] I Lloyd 177; 1 Br. & Col. Pr. Cas. 156.
[2] The *Panariellos* (IV Lloyd 306).
[3] IX Lloyd 12; III Br. & Col. Pr. Cas. 670.
[4] VIII, *ibid.*, 484; III, *ibid.*, 463.
[5] II Br. & Col. Pr. Cas. at p. 121.
[6] V Lloyd 44; II Br. & Col. Pr. Cas. 293.
[7] VIII, *ibid.*, 330; III, *ibid.*, 464.
[8] See Sec. 259 *infra*.
[9] VII, *ibid.*, 307; III, *ibid.*, 181.

the Order in Council," thus answered the question: "There is no decision against it." Apparently the absence of a decision against the validity of an Order in Council whose validity was attacked created a presumption at least that it was valid.

But while reported decisions constituted conclusive authority, the lack of decisions supporting a claim for condemnation could not be relied upon by the owners of goods to support a claim for their release. Thus in the case of the *Roumanian*[1] where the appellants relied on the dearth of reported cases in which enemy goods on British ships at the commencement of hostilities had been condemned as prize (in fact there was no case whatever), Lord Parker observed:

> "With regard to the dearth of reported decisions, it is to be observed that the plainer a proposition of law the more difficult it sometimes is to find a decision actually in point. Counsel are not in the habit of advancing arguments which they think untenable, nor, as a general rule, do cases in which no point of law is raised and decided find their way into law reports. If, on the one hand, it be difficult to find a case in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, it is, on the other hand, quite certain that no case can be found in which such goods have been held immune from seizure."

On the contrary, such decisions as there were, bearing upon the point, did not, he said, support the appellants' contentions, but rather contradicted them.

So great is the respect shown by a British Prize Court for the opinions of its earlier judges that even the dicta of the latter in certain circumstances will be cited and relied upon in support of the conclusions reached. Thus in the case of the *Oscar II*[2] where the question at issue was whether the Crown was liable for damages for the loss of innocent goods, resulting from the negligence of the naval authorities, Lord Sterndale remarked that it was a very important question the determination of which would require time for consideration, but for the fact that in his opinion it had already been decided in the case of the *Zamora;* at least there were *dicta,* in the opinion of Lord Parker, who gave the judgment in that case, which were applicable in the

[1] II Lloyd 378; I Br. & Col. Pr. Cas. 536. Sir Samuel Evans evidently sometimes entertained serious doubt as to the validity of the reasons upon which former decisions were based; indeed, he sometimes almost admitted that they were not sound, but in such cases he would say, "I accept the law as it stands." See Sec. 9, his opinion in the *Maningtry* (II Lloyd 202).

[2] IX, *ibid.*, 267; III, *ibid.*, 421.

present case. As to the kinds of *dicta* and the weight to be given them, Lord Sterndale said:

"What was said in the *Zamora*—the words I am going to refer to in a minute—may perhaps be said to be *dicta;* but it seems to me that there are two kinds of *dicta;* one is a *dictum* which is uttered, if I may say so, casually without the words being really under the consideration of the person who is delivering his judgment; another is a *dictum* which is the considered judgment, and part of the process of reasoning, of the person who is delivering his judgment; and if I find a *dictum* of that second kind by the Privy Council, in my opinion it is my duty to follow it."

Sec. 118. Foreign Decisions as Authority. The British Prize Courts frequently invoked the decisions of foreign courts, especially those of the United States, sometimes those of the Japanese Prize Court during the Russo-Japanese war and occasionally French prize jurisprudence. In the case of the *Zamora,* where Sir Samuel Evans was discussing the sale of goods by interlocutory orders before condemnation he cited a list of cases on the subject decided by the American courts which he said "next possibly to our own have done most for the elucidation and development of the law of nations applicable to the law of prize." [1]

In the case of the *Marie Glaeser* Sir Samuel invoked the authority of American, Japanese, and French decisions relative to the claims of neutral mortgagees of captured enemy ships and in the case of the *Roumanian* he cited and quoted from various American and Japanese decisions in support of his conclusion that the cargo of a ship seized in a warehouse in port was within the jurisdiction of the Prize Court. In the case of the *Berlin* he referred to the judgment of Mr. Justice Gray of the United States Supreme Court in the case of the *Paquête Habana* as "full of research, learning and historical interest" and added that it would be "a work of supererogation" for him to review again the practice of other countries in respect to the exemption of fishing vessels from capture. In the same case he quoted from several decisions of the Japanese Prize Court (1905). In the case of the *Ophelia* Lord Mersey cited the authority of the Supreme Court of the United States on the effect of "spoliation of papers"; in the case of the *Kim* both court and counsel relied upon the decisions of the United States Supreme Court during the Civil War, dealing with the subject of continuous voyage, and reference was

[1] In the case of the *Odessa* and the *Cape Corso* (II Lloyd 405) the Judicial Committee stated that "a considered judgment of the United States Supreme Court was entitled to the greatest possible weight."

also made to Japanese practice and to the German case of the *Maria*. In the case of the *Lützow No. 4* the Prize Court for Egypt after citing a long list of Lord Stowell's judgments on the question of "trade domicile" added "but besides the English authorities there are several American cases which deserve attention," etc. In the case of the *Alwina* both counsel and court invoked in addition to a long list of English decisions, a number of American and Japanese decisions on the question of the liability to confiscation of a vessel for carrying contraband on a previous voyage. In the case of the *Asturian* the decision of the United States Supreme Court in the case of *Thirty Hogsheads of Sugar v. Boyle* was invoked as authority for the proposition that goods the produce of enemy soil are liable to confiscation; and in the case of the *Bangor* several American decisions were relied upon as authority for the view that the validity of a capture made in neutral waters can be challenged only by the neutral and not by the enemy belligerent. In the case of the *Jeanne and other vessels* (No. 2) where a great array of English and American decisions was cited by counsel, Sir Samuel Evans relied mainly on the American cases of the *Commercen* and the *Peterhof* for the view that freight is never paid to neutrals in respect of the carriage of contraband, except as a matter of grace or discretion; in the case of the *Kronprinsessan Margareta* (No. 1) where there was an extended citation of English, American, and Japanese decisions, the American case of the *Peterhof* was especially relied upon by Sir Samuel Evans as authority on the doctrine of "infection" of contraband; and in the case of the *Hakan* there was not only an elaborate citation of English, American, and Japanese decisions, but an extensive summary of the traditional views of all the maritime powers and of their prize regulations, for the purpose of establishing the proposition that a neutral ship carrying conditional contraband to an enemy port being a base of supplies was confiscable according to the customary law of nations.

Sec. 119. Doctrine and Practice of Continental Prize Courts. As is well known, the continental Prize Courts attach far less importance to the doctrine of *stare decisis* than do those of Great Britain and the United States. They do not consider previous decisions binding upon them, especially when they are not in accord with modern opinion or in harmony with new and changed conditions. With them the law of nature and the Roman law exercise a larger influence; the opinions of publicists

are given greater weight as authority and the method of historical interpretation, and (in Germany especially) interpretation by analogy is more frequent. In consequence of the training of the English and American judge he is more inclined to think *in concreto* whereas the continental judge thinks more *in abstracto* and is accustomed to search for the rule of law less in the precedents than in abstract principles.[1] Consequently one does not find such a profusion of cited cases in their decisions as encumber and lengthen the English and American decisions; but for this very reason they are far less instructive and illuminating to the student of international law and are regarded in Anglo-Saxon countries as less authoritative. Nevertheless, there has been an increasing disposition among continental courts in recent years to cite judicial decisions and a visible reluctance to depart from them.[2] Thus the German supreme Prize Court adhered to its own decisions made during the early years of the war and refused to modify its judgment in response to new arguments by which claimants of innocent goods destroyed on enemy vessels endeavored to convince the Court that its previous decisions denying compensation in such cases were wrong.[3] The German Prize Court in one case referred to the award in the case of the *Alabama claims*[4]; in another to the English decisions in the *Möwe* and the *Marie Glaeser*[5]; in another case to the French decisions in the cases of the *Ludwig* and the *Vorwaerts* (1872)[6] and occasionally to its own previous decisions rendered during former wars.[7] The Austro-Hungarian Prize Court in two cases

[1] Compare Kaeckenbeck, "Divergences Between British and Other Views on International Law," IV *Transactions of the Grotius Society* (1919), pp. 223-224. This author calls attention to the character of the memoranda presented by the Powers to the London Naval Conference (1908-09) as evidence of the difference in the point of view of the Anglo-American and the Continental jurist. While the memoranda submitted by the British and American governments contained many references to decided cases, the French memoranda contained no such references at all "owing to the different principles of French law." "In French law" the note accompanying the French memoranda said, "whatever the authority attached to the decided cases even when they are constant on such and such a point, they do not form juridical rules obligatory for the *ensemble* of citizens or for the courts; they are not considered as constituting an element or a source of law. While the general interest requires that the judge should not depart, without grave reasons, from decisions already made by the courts, it is, however, considered to be his duty not to allow himself to be stopped by precedents whose experience has demonstrated their inconvenience" (*Ibid.*, p. 222).

[2] Cf. J. P. Hall, "Precedents in International Law," 26 *Int. Jour. of Ethics* 152.

[3] The *Correntina*, (I *Entsch.* 111).

[4] The *Sydney Albert* (I *Entsch.* 62).

[5] The *Fenix* (I, *ibid.*, 1).

[6] The *Glitra* (I, *ibid.*, 34).

[7] The *Fenix* (*supra*), the *Gefion* (I, *ibid.*, 21); and the *Indrani* (I, *ibid.*, 95).

relied, in part, upon two decisions of the German Prize Court at Hamburg.[1]

It does not appear that the French Prize Council or the Council of State, sitting as a court of appeal, ever once referred to a previous decision of a French prize tribunal, though in two cases, but apparently only two, decisions of foreign Prize Courts were cited.[2] The Italian Prize Commission in several cases referred to its own previous decisions, but apparently only in two cases did it ever cite a decision of a foreign Prize Court.[3]

The Belgian Prize Commission appears to have attached more importance to the decisions of foreign Prize Courts than those of any other continental country. In the cases of the *Agiena*[4] and the *Gelderland*[5] it cited various English and French decisions on the subject of capture and recapture; in the *Roelfina*[6] it invoked the decision of Lord Stowell in the *Jan Frederik* on the subject of transfers *in transitu;* in the case of the *Zaanstroom*[7] it relied upon Sir William Scott's opinions in the *Santa Cruz* and the *Charlotte Caroline* and upon the decision of M. Portalis in the case of *Hasard v. Statira.*

The Chinese Prize Court invoked foreign decisions or practice in only two cases. In both of them it reviewed the past practice of other countries in regard to the treatment of enemy merchant vessels found in port at the outbreak of war and referred to the British case of the *Prinz Adalbert* and the Siamese case of the *Samsen,*[8] both German vessels, one captured in an English port at the outbreak of the war, the other in a port of Siam. In the few cases decided by the Japanese Prize Court no foreign decisions were cited, although in the case of the *Zuimo* reference was

[1] The *Caledonia* and the *Stjernbourg* (*supra* Sec. 113).

[2] In the case of the *Tinos and other vessels* (Fauchille, *Jurispr. Franc.* 390) the decisions of the Japanese Prize Court in the cases of the *Ekaterinoslav* (1904) and the *Mukden* (1905) were relied upon in support of the view that a succession of hostile acts by the Germans in the waters and on the territory of Greece had the effect of transforming Greek territory into a theater of war and hence the owners of certain enemy vessels seized in Greek waters could not contest the validity of the seizures therein.

In the case of the *Dacia* (*ibid.*, 101) the Prize Court cited Lord Stowell's decision in the case of the *Jemmy* (1801), the decision of the United States Supreme Court in the case of the *Benito Estenger* (1900) and the decision of the Italian Prize Commission in the case of the *Aghios Georghios* (1912).

[3] The cases of the *Cervignano* and *Friuli* (Fauchille et Basdevant, *Jurispr. Ital.* 181), where reference was made to two German cases (one of which was the *Primula*, and the *Mikail* (*ibid.*, 220), and where the decision of the Japanese Prize Court in the case of the *Romulus* (1905) was cited.

[4] *Moniteur Belge*, 1920, p. 405.

[5] *Ibid.*, 1919, p. 5772.

[6] *Ibid*, 1920, p. 403.

[7] *Ibid.*, 1920, p. 400.

[8] The *Albenga* (*Judgments of the High Prize Court of China*, p. 34) and the *Deike Rickmers* (*ibid.*, p. 50).

made to the "precedents and established rules of international law."

Sec. 120. Opinions of Text Writers and Jurists as Authority. The British Prize Courts frequently had recourse to the opinions of eminent text writers and jurists as evidence of what the customary law and practice were, when there were no conventions or municipal legislation which furnished a rule upon which a case could be decided and where there were no decided cases covering the point at issue. Even when controlling conventions the meaning of which was in doubt, existed, their opinions were sometimes relied upon in support of a particular interpretation. Naturally, also, their opinions were constantly invoked by counsel. The Attorney-General, Sir John Simon, at the first sitting of the Prize Court in 1914 (case of the *Chile*), referring to the "common law of nations" as the "second branch" of the law which the Court was charged with administering, said it "depended on the teaching and learning of the civilians and other great authorities, and no special treaties or international arrangements entered into by the great powers of the world."

In the case of the *Valeria*,[1] there being no convention upon the basis of which a decision could be reached and where the question was whether there was an applicable rule of customary international law enforceable in the Court, Sir Henry Duke said: "The principles which are to govern the decisions of the Court must be found, therefore, in the accepted authorities. Text books and cases were relied upon on both sides." In the case of the *Marie Leonhardt*[2] the same judge adverting to the practice extending over 60 years of allowing enemy merchant vessels found in port at the outbreak of war to depart, a practice which was claimed to have established a custom or usage having the effect of law, said: "various statements of eminent jurists were also relied upon as evidence of general, if not universal, recognition of the alleged right. Upon careful examination, I think the text books referred to do not bear out the contention of the claimants." The authorities most frequently invoked by counsel and cited by the courts were Hall, Holland, Oppenheim, Phillimore, and Westlake, in England; Story, Kent, Wheaton, Dana,[3]

[1] IX Lloyd 23; III Br. & Col. Pr. Cas. 644.
[2] X, *ibid.*, 178; III, *ibid.*, 768.
[3] About two-thirds of the text of Sir Samuel Evans' opinion in the case of the *Clan Grant* (I Lloyd 398; I Br. & Col. Pr. Cas. 272) consists of quotations from Wheaton and Dana, as evidence of the law governing commercial domicile. In the case of the *Jeanne and other vessels*, No. 2 (II Br. &

and Halleck in the United States; Hautefille and Bonfils in France; and Holtzendorff and Heffter in Germany. Judge Story's *Principles and Practice of Prize Courts* was often cited, as were his decisions as a justice of the United States Supreme Court, sometimes in words of high praise and always as an authority on prize law of the first rank.[1] It is doubtful if any authority carried more weight with the British Prize Courts or whose opinions were more often approved. Naturally the early classical writers, such as Grotius, Bynkersholk, Pufendorf, Sir Mathew Hale, and Vattel, were sometimes referred to as evidence of ancient usage and practice.[2] Nevertheless the Prize Courts, not infrequently, took pains to point out that text writers could not be relied upon as authorities and that their opinions were never conclusive as against judicial decisions. Thus in the *Kronprinsessan Margareta and other vessels*[3] Lord Sumner, speaking for the Judicial Committee, observed "That valuable as the opinions of learned and distinguished writers must always be as aids to a full and exact comprehension of a systematic law of nations, Prize Courts must always attach chief importance to the current of decisions, and the more the field is covered by decided cases the less becomes the authority of commentators and jurists."[4] In the case of the *Hamm and the Apolda*[5] the South African Prize Court, adverting to the fact that the question at issue could not be decided on the basis of the common law, but only by admiralty law, observed that "no doubt judges are guided by the teaching and learning of civilians

Col. Pr. Cas. 300), where Sir Samuel said "it was clear on all the authorities and from the text books," etc., he cited Wheaton's statement of the law and observed that there was "but one case in the books of an exception to this rule" (The *Neptunus*).

[1] In the case of the *Corsicans Prince* (II Lloyd at p. 209) Sir Samuel Evans referred to Judge Story "as an exponent in treatises and judgments of matters relating to prize law," who was "hardly second to Lord Stowell himself," and Judge Grain of the Prize Court for Egypt cited him as "perhaps the greatest American authority in prize law" (The *Lützow, No. 6*, III Br. & Col. Pr. Cas. at p. 334).

[2] See, for example, the *Leonora* (VII Lloyd at p. 307); the *Roumanian* (I Lloyd 191) and the *Hakan* (V, *ibid.*, 161). In the latter case Sir Samuel Evans observed that "the confiscation of the ship had been justified by Bynkershoek and other jurists of authority."

[3] VIII Lloyd 241; III Br. & Col. Pr. Cas., p. 810. Sir Erle Richards (*Br. Yr. Bk. of Int. Law*, 1920-21, p. 29) mildly reproaches the text writers "whose business it is to examine the practice of nations" for never having discovered that the English Lords of Appeal had during the Napoleonic wars upheld the right of retaliation against neutral commerce, that fact having only been brought to light in the course of the argument in the *Stigstad* and *Leonora* cases during the World War.

[4] Compare in this connection the opinion of Mr. Justice Gray of the United States Supreme Court in the case of the *Paquête Habana* (175 U. S. 677) as to text writers as sources of international law.

[5] Cases decided in the Prize Courts of South Africa, p. 8.

but their opinions are not law beyond the extent of their adoption."

The continental Prize Courts cited the text writers with less frequency although it is said that their opinions carry more weight than they do with British and American courts. In the cases decided by the supreme Prize Court of Germany there are hardly more than a half dozen which contain references to text writers and jurists.[1] Apparently the only French case in which a text writer was ever referred to was that of the *Dacia*[2] where a passage from Story's *Principles and Practice of Prize Courts* was quoted as authority for the view that a vessel which after having been transferred from an enemy to a neutral flag, continues to trade with the enemy, is liable to capture. The Italian Prize Commission appears never to have cited a modern text writer or jurist in any case, although on one occasion it quoted a definition from the Digest and cited an ancient writer named Casaregis.[3] The Belgian Prize Commission appears to have placed greater reliance upon the authority of eminent text writers than did the prize tribunals of other continental states. In the cases of the *Midsland*[4] and the *Gelderland*[5] the opinions of Calvo on the subject of recapture and that of Wheaton on the question of what constitutes capture were invoked, and in the case of the *Agiena*[6] the authority of an array of text writers, including Bry, Despagnet, Wheaton, Twiss, Fiore, Calvo, Pistoye and Duverdy, Rolin, Bluntschli, and others was appealed to in support of the principle that there is no recapture in the sense generally attributed to the term in international law only when there has been no Prize Court decree of the enemy country depriving the owner of his vessel.

Sec. 121. Effect of Changed Conditions upon the Doctrine of *Stare Decisis*. As stated above, the conditions under which the Prize Courts were called upon during the late war to apply the rules enunciated and the principles laid down by Lord Stowell were different in many respects from those prevailing in his day. The new conditions resulted especially from the introduction of

[1] In the important case of the *Glitra* references are made to the writings of Schramm, Rehm, Geffcken, Heffter, Wehberg, Heilfron, Dupuis, Bonfils, de Boeck, Wheaton, Bordwell, Calvo, Oppenheim, and Hall. In the *Bertha Elisabeth* Schramm is cited; in the *Indian Prince* Chaucy is referred to; and in the *Thorsten*, Einicke's *Rechte und Pflichten der Neutralen Mächte im Seekrieg* is quoted as a source of information concerning a proposal made at the London Naval Conference.

[2] Fauchille, *Jurispr. Franc.*, 101.

[3] The *Illa and other vessels*, Fauchille et Basdevant, *Jurispr. Ital.*, 204.

[4] 47 *Rev. de Droit Int. et de Lég. Comp.* (1920), 118.

[5] *Ibid.*, 125.

[6] *Moniteur Belge*, Jan. 17, 1920, p. 405.

new methods and instruments of naval warfare, the development of new means of transportation and communication and from the adoption of new methods of international trade and especially the financing of the sale and handling of cargoes. The British Prize Courts while strongly wedded to the doctrine of *stare decisis* could not ignore entirely the change of conditions and in some cases took them into account in reaching their conclusions. Thus in the case of the *Kim* Sir Samuel Evans referring to "the state of things as they were in the year 1914," said: "While the guiding principles of the law must be followed, it is a truism to say that international law, in order to be adequate as well as just must have regard to the circumstances of the times including the circumstances arising out of the particular situation of the war or the condition of the parties engaged in it." [1] Again in the case of the *Odessa and the Cape Corso* [2] Sir Samuel, although refusing to take into account the changed commercial practices upon which the claimants based their case and while asserting that the decisions of a court of law "should proceed upon defined principles," he admitted that those principles had to be applied to "ever varying facts."

He added: "Precedents handed down from earlier days should be treated as guides to lead, and not as shackles to bind. But the guides must not be lightly deserted or cast aside. Already in the course of the present war, I have had to deal with questions not remote from those raised in these proceedings; and in dealing with them I have striven after careful consideration to decide them in this spirit."

Again in the case of the *Hakan* [3] Sir Samuel, referring to the law administered by Prize Courts—"the law of nations or international law," which he said had in the course of time "naturally fallen within general principles," added: "from its nature it is subject to modifications as time rolls on and the world's international conditions change." Finally, to quote one more passage from Sir Samuel, in the case of the *Leonora* [4] defending the right of a belligerent to interfere with neutral trade in the accomplishment of the legitimate destruction or crippling of the enemy's commerce, he said:

"In the application of the principle, the boundary of the law of nations has been extended from time to time to adapt itself to new and ever-

[1] The last part of the quotation is from Lord Stowell in the *Jonge Maragretha* (1 C. Rob. 189).
[2] I Lloyd 301; I Br. & Col. Pr. Cas. 163.
[3] V, *ibid.*, 161; II, *ibid.*, 210. [4] VII, *ibid.*, 262; III, ibid., 203.

changing conditions. This law must from its nature have room for expansion. It cannot, and never could be squeezed into a mould of a particular size or shape. It never had, or could have the quality of immutability attributed to the laws of the Medes and Persians. It could not be confined within artificial limits like an Act of Parliament. It has the essence and qualities of a living organism like the common law of this realm."

In the case of the *Gutenfels* [1] Judge Cator of the Prize Court for Egypt in considering the question whether he was bound by the "dead hand of outworn precedent" and particularly by an ancient rule of English law which denied to alien enemies a *jus standi in judicio,* said:

"I cannot accede to this contention. I take the same view as the President of the English Court. I consider that the rule is one of practice which it is open to the Court to vary, not indeed capriciously, but for good cause. And I think that it is not the right but the duty of the Court so to alter its practice from time to time as to reflect the changing conditions of civilization that it has to serve. Now there can be no doubt that the general attitude of mind and conditions of thought of civilized mankind has greatly altered during the last hundred years, and an endeavor has been made to formulate this changed opinion in the various International Conventions that have been signed at Berne, the Hague, and elsewhere and it is just and right that the milder views of the present generation should find an echo in the procedure of our Prize Courts."

Again in the case of the *Lützow* (No. 4) [2] Judge Cator, after reviewing a long list of decisions, thus stated the "privilege and duty" of the Prize Courts in respect to the recognition of changed conditions:

"I have been at some pains to illustrate from decided cases what I conceive to be the principles upon which the Prize Court acted more than a century ago, but it is no less important to consider whether those principles still maintain their old force. For I have to ask myself whether time has brought about any changes in methods of trade or in the world's attitude towards warfare of which the Court ought to take account. It must not be forgotten that the old prize rules came to maturity during the Napoleonic wars, and that when they were framed the steamer and the electric telegraph were alike unknown, though it needs an effort of the imagination to picture to ourselves a society in which business was transacted by the sailing ship and the stage coach. Happily for the nation our Prize Courts are only called into being after long intervals of time. In those intervals prize law sleeps, and, as the Legislature has never thought fit to fetter or control the Judges by specific directions as to the law which they are to administer, but gives them a generous and ample jurisdiction to observe the law of nations, it becomes the privi-

[1] I Br. & Col. Pr. Cas. at p. 104. [2] I, *ibid.*, 133.

lege and duty of the Court to see that its rules and practice keep in harmony with the general sentiment of civilized humanity; else it may subject itself to the reproach that it administers but a dry husk in lieu of a living law."

In the case of the *Achilles and other vessels* [1] Lord Sterndale, referring to the decision in the case of the *Glenroy*,[2] said:

"There is no doubt, I think, that that decision is an extension to a considerable extent of the old doctrine of seizing goods. I doubt very much whether, under the old doctrine, when goods were once gone, and the goods themselves could not be seized, any seizure of proceeds would have been allowed; but circumstances change, and the principles upon which the Court acts have to be adapted to changed circumstances."

The Privy Council likewise adopted the view that important changes of conditions which had taken place since Lord Stowell's day ought to be taken into consideration in applying the rules which he enunciated as just and proper in the circumstances then existing. Thus Lord Sumner said in the case of the *Svithod:* [3]

"Their Lordships are, of course, very fully impressed with the great importance of the whole topic of unneutral service, particularly in view of the fact that the change in the circumstances under which maritime warfare is now carried on is so great since most of the cases relied upon were decided. On some proper occasion it might be necessary to define with very great accuracy the way in which well-known principles should be applied under modern conditions."

Sec. 122. Effect of Changed Conditions Strictly Construed. But while the British Prize Courts admitted that the law which they were charged with applying must be adapted to "new and ever changing conditions," that they were not "fettered by the dead hand of outworn precedent," that decisions handed down in earlier days should be treated as "guides to lead and not as shackles to bind," and the like, they were slow to admit in particular cases that the changed conditions and circumstances relied upon were such as to justify a departure from the principles laid down in the earlier cases, and in fact they rarely did so. The Prize Courts of Great Britain have always considered that they were bound as a general rule by previous decisions.[4] Lord Stowell in his day held that he was bound by

[1] VII Lloyd 1; III Br. & Col. Pr. Cas. 637.
[2] VII Lloyd 200. [3] X, *ibid.*, 1; III, *ibid.*, 574.
[4] Pyke, "The Law of the Prize Court," 32 *Law Quarterly Review* (1916), p. 164.

the "course of judicial administration" that had prevailed, even when he considered it against the true principle [1] and his successors do not appear to have adopted a different view. In the case of the *Marie Glaeser* [2] certain neutral mortgagees of a captured German vessel put in a claim for a sum payable out of the proceeds of the sale of the condemned vessel, to cover the amount advanced by them. They argued, *inter alia*, that the decision of Lord Stowell in the *Tobago* [3] relative to the rights of lien holders were not applicable to neutral mortgagees and that, in any case, the international law of prize should be "extended and applied so as to protect neutral mortgagees of enemy ships in accordance with the principle on which the Declaration of Paris was alleged to have been founded." They pointed out that the law of nations had advanced since Lord Stowell's day, particularly by the adoption of the Declaration of Paris, and the protection claimed was necessary to accord with the spirit and policy of the Declaration. Sir Samuel Evans, however, regarded their contention as being in effect a plea for the creation of a new rule of law for their benefit, which, he said, was beyond the province of a Prize Court.[4] He regarded the Declaration of Paris as a part of the law of nations but held that it did not support the case of the claimants. The Court, he said, could only enunciate what it conceived to be the law of nations and where there was controversy between nations as to what it required or forbade, the controversy must be settled by international agreement. It was not for the Prize Court to declare antecedently a controverted doctrine to be a part of international law. Finally, he said, there was no Prize Court decision since 1856 which sustained their claim; on the contrary there were many (which he cited) against such claims. The Prize Court for Egypt in the case of the *Emil* [5] applied the same rule to British mortgagees. In fact Sir Samuel Evans had held in the case of the *Marie Glaeser* that no distinction between British and neutral mortgagees could be recognized. Similarly, he denied the claim of certain allied shipowners (Russians) as captors, freight on an enemy cargo carried in their ship under a charter with a German firm, for the reason that the precedents were against it.[6] He was content, he said, to rely upon the opinion of Lord Stowell

[1] The *Henrik and Maria* (4 C. Rob. 43).
[2] I Lloyd 56; I Br. & Col. Pr. Cas. 38.
[3] 5 C. Rob. 218; I Eng. P. C. 456.
[4] Compare in this connection Secs. 37-38, *supra*.
[5] I Br. & Col. Pr. Cas. 257.
[6] The *Parchim*, IV Lloyd 357; I Br. & Col. Pr. Cas. 579.

in the case of the *Neptunus* (1807).[1] Upon appeal the judgment was affirmed by the Judicial Committee.[2]

In the case of the *Odessa* and the *Cape Corso* (1914)[3] British pledgees of bills of lading of enemy goods which had been captured claimed the goods as their property or as having a beneficial interest therein, such as mortgagees have. They pointed out that the practice of bankers of advancing money on cargoes had become the accepted method the world over of financing the owners of cargoes during their transportation and that the bankers "would have been in consternation if they had thought that in case of war their security would be gone."[4]

They admitted that there were precedents which if followed (such as the *Ida*)[5] might justify condemnation of the goods but they maintained that the decisions of Prize Courts in former times were less binding as precedents than are the decisions of civil courts, because the principles of international law which are administered by Prize Courts "are constantly changing and growing in accordance with the development of trade, the practice of nations and new international contracts." The case ought not, they argued, be governed altogether by the *Ida* because there had been a great development since that case was decided, in the methods of trade and of the principles of law applicable to trade. Moreover, they contended that as the claimants here were British subjects who had innocently advanced money in time of peace to cargo owners who subsequently became enemies, the Prize Court ought to take this fact into consideration. Sir Samuel Evans, however, considered their argument as a plea for "an extension of the law" so as to protect those who were not entitled to protection under it as it then stood."

"At the outset," he said, "two things must be remembered: First, that this is a Court of Law; and secondly, that the law to be administered here

[1] 6 C. Rob. 403; I Eng. P. C. 593.
[2] IV Lloyd 388; II Br. & Col. Pr. Cas. 498.
[3] I, *ibid.*, 301; I, *ibid.*, 163.
[4] Mr. E. S. Roscoe, late registrar of the Prize Court at London, thus describes in his book, *Lord Stowell, His Life and the Development of English Prize Law* (p. 82), the modern practice which he points out has entirely displaced the old system of bottomry (*respondentia*) bonds: "In connection with cargoes, modern commerce has developed a far-reaching system of advances by bankers on the security of bills of lading. Cargoes are mortgaged to bankers, who thus finance sellers long before the cargo is actually delivered; millions are, in fact, lent on this form of security. The object of these transactions differs entirely from that of the old-fashioned advance on bottomry or *respondentia* bonds to a master of a ship who is without money in a distant part of the world. But the result of the transaction is the same: it creates a creditor's lien on the cargo."
[5] Spinks, 26 (1854).

is the law of nations—that is, the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion.

"The decisions of a Court of Law should proceed upon defined principles. Those principles have to be applied to ever-varying sets of facts. But the Court has the function and duty not merely of determining individual cases, but of determining them upon principles which shall be a guide to others as to what their positions and rights are in the eye of the law."

Thus the doctrine laid down by Lord Stowell more than a hundred years earlier that the holder of a bottomry bond who had a lien on the vessel for money which he had advanced had no right to claim in the Prize Court against the proceeds of a captured vessel,[1] was rigorously applied by Sir Samuel Evans to advances of money on the security of bills of lading. Upon appeal, the decision was affirmed by the Judicial Committee.[2] Adverting to the argument of the appellants that since the widespread practice of making advances on the security of bills of lading had grown up since Lord Stowell's decisions were pronounced the rule laid down by him should in the interest of modern commercial methods be disregarded, their Lordships were content to refer to the decision of the United States Supreme Court in the year 1900 in the *Carlos F. Roses*[3] rejecting the claim of a neutral who had advanced money on a cargo on a captured enemy ship, which decision had been rendered at a time when the practice referred to was well known. While this decision was not binding on the British Prize Court, "the considered judgment of the Supreme Court of the United States was entitled to the greatest possible weight." Their Lordships added that it was difficult to see how any change—if there had been any—in commercial practice could invalidate the reasons which led to the decisions referred to. Finally, adverting to the contention that adherence to the old rule would involve serious injustice to innocent British subjects, their Lordships observed that similar injustice and loss, though on a less scale, must have been occasioned by the application of the rule in the eighteenth and early nineteenth centuries and in fact similar arguments had been addressed to Lord Stowell, but without effect.

Sec. 123. Observations on the English Doctrine of *Stare Decisis*. The decision in the above mentioned case had the merit of preserving the integrity of a cherished English legal

[1] The *Tobago*, 5 C. Rob. 218; I Eng. P. C. 456 (1804); also the *Mariana*, 6 C. Rob. 24; I Eng. P. C. 518.
[2] II Lloyd 405; I Br. & Col. Pr. Cas. 556. [3] 177 U. S. 655.

principle—the rule of *stare decisis*—and of maintaining the "continuity" of British Prize Law, but it sacrificed substantial justice to the maintenance of the principle. Even English jurists have expressed the opinion that in view of the changed conditions the Prize Court during the late war might have found some ground by which to limit the effect of the previous judgments.[1] It is true that the British government recognized the justice of the claims thus denied by the Prize Courts and set up an official committee to investigate such claims and where they were found to be just the claimants were paid out of the prize fund. Nevertheless, there is something anomalous in a system under which the decisions of a Prize Court charged with doing justice are regarded as legally correct but which cause injustice so obvious that the government feels obliged to repair it.[2]

Sec. 124. View of the Judicial Committee. The doctrine laid down by Sir Samuel Evans and affirmed by the Judicial Committee in the case of the *Odessa* was followed by the Judicial Committee in the case of the *Kronprinsessan Margareta and other vessels*[3] (affirming the judgment of Sir Samuel Evans), where their Lordships held that a Prize Court has no discretion or authority to abrogate settled and binding rules of Prize Law on the ground that their application is inconvenient or inconsistent with the smooth and regular working of modern commerce. The rule attacked in this case (the doctrine of infection of contraband) had been a settled rule of English prize law, said Lord Sumner, for 150 years, although he admitted that some continental jurists had criticized it adversely and that some Prize Courts had rejected it. It had, however, long been followed in the United States and had recently been adopted in Japan. Their Lordships were "bound by decisions of their predecessors, which, consistent as they are, it is too late to overrule and impracticable to distinguish." Adverting to the argument of the appellants that changes in mercantile practice should be taken into account by the Prize Court and the law adapted so as to harmonize with the growth and development of commercial methods, Lord Sumner declared that "trade machinery, which is the growth and creation of years, cannot supersede the settled law of prize" and he went to the length of suggesting that it was for merchants themselves to alter their practices so as to conform to the law. Finally, he pointed out the advan-

[1] Roscoe, *Life of Lord Stowell*, p. 84.
[2] Compare Roscoe, *ibid.*, p. 85. See further as to this Sec. 11, *supra*.
[3] VIII Lloyd 241; III Br. & Col. Pr. Cas. 803.

tage to neutrals in the certainty of the law which results from the strict adherence by the Prize Courts to the established precedents. In this connection he observed:

"In any case, and although Prize Courts will always be mindful of the just rights of neutrals, it is certain that none would be greater sufferers than neutral merchants, if it were once admitted that in Prize Courts fixed principles could be disregarded and settled law could be set aside in hard cases, for cases may be hard to belligerents as well as to neutrals. The President, Lord Sterndale, made some observations in his judgment in the case of the *Rena* which show how much he was impressed with the argument that a combination of these two rules, leading to the consequence of condemnation in the present case, is harsh and impolitic, but it is plain that if mere considerations of particular hardship prevailed to alter the application of the law, the whole uniformity of the system administered by Prize Courts would be impaired."

These cases fairly illustrate the length to which British Prize Courts go in support of the doctrine of *stare decisis*. As stated above, it is this which distinguishes the practice of the British Prize Courts fundamentally from those of continental Europe. The English practice undoubtedly has its advantages; at the same time it sacrifices to the dead hand of precedent the principle of flexibility, the progressive development of the law and in individual cases, the solid claims of substantive justice.[1] Sir Henry Duke himself, in the case of the *Prins der Nederlanden*,[2] asserted that there was a higher rule than the law (in this case which forfeited the right of an enemy carrier of contraband, to freight) namely, "the duty of the Court to do justice."

In the case of the *Roland*,[3] Sir Samuel Evans was asked by the Crown to abandon the old rule that a captor was not entitled to freight on goods released unless he delivered them to their final port of destination, and to allow some freight for the part of the voyage actually made. This he refused to do. The old rule, he said, was a part of the law of nations; so far as he knew, it had never been departed from and it must be adhered to. This case is distinguishable from those referred to in the preceding sections in that it was the Crown here and not British or neutral subjects who pleaded in vain for an abandonment of an old rule.

[1] Compare Bentwich, *The Law of Private Property in War* (p. 50), who remarks that not a little of American and English authority on various matters is obsolete or out of harmony with current conceptions, "but being embodied in case law, it has not been swept away."
[2] VI Lloyd 181; III Br. & Col. Pr. Cas. 701.
[3] II, *ibid.*, 253; I, *ibid.*, 188.

Sec. 125. But the Prize Court Recognized Changes in International Law. As stated above, the British Prize Courts rarely departed from the old rules of international law either for the purpose of sustaining the claims of the Crown or those of British, allied, or neutral subjects. Especially when the application of the old rules was necessary to sustain the validity of a capture they were nearly always applied even when they were inconsistent with present day conceptions and practices and sometimes with substantive claims of justice.[1] In rare cases, however, where, although there were no reported cases in favor of granting immunity to a particular class of vessels, but where there had been an alteration of the old rule of international law to which Great Britain had expressly or tacitly given her assent, the Prize Court departed from the judicial precedents and gave effect to the new rule. Thus in the case of the *Berlin*,[2] a German fishing vessel captured by the British naval forces, Sir Samuel Evans said that although there were no decisions in favor of the immunity of such vessels, he was of the opinion that after the lapse of a century the rule of immunity had become "a sufficiently settled doctrine and practice of the law of nations" and that this rule was one which Prize Courts, administering the law of nations, were bound to take judicial notice of and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.[3]

III

The Relation Between International and Municipal Law

Sec. 126. View of British Prize Courts. Another circumstance which distinguished the decisions of the British Prize Courts from those of other countries was the frequency with which they asserted emphatically that the law which they were charged with administering was international law and nothing

[1] See notably the cases of the *Kim*, the *Hakan*, the *Roumanian*, and the *Leonora*.

[2] II Lloyd 43; I Br. & Col. Pr. Cas. 29.

[3] It may also be observed that the English common law and Prize Courts during the late war greatly attenuated, if they did not actually overrule, the doctrine of Lord Stowell in the case of the *Hoop* regarding the *persona standi in judicio* of enemy aliens. See especially the cases of *Porter* v. *Freudenberg* (1 K. B. 857) and *Schaffenius v. Goldberg* (1 K. B. 184), discussed in my *Int. Law and the World War*, I., 125 ff., and by Q. Wright, 11 *Amer. Jour.* 18. See also the Prize Court decisions referred to in Secs. 78-79, *supra*.

else. Thus in the case of the *Marie Glaeser,*[1] Sir Samuel Evans declared that the "law of nations alone is the law which this court has to administer." Again in the case of the *Odessa* and the *Cape Corso,*[2] he said: "The law to be administered here is the law of nations—that is, the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion." In the case of the *Hakan,*[3] he said: "there is no doubt that the law to be administered in this Court is the law of nations —or international law, as it is often called—and not our municipal law." In the case of the *Bärenfels,*[4] Judge Grain of the Prize Court for Egypt said:

> "By the Order in Council and the commission appointing us to sit in prize in this Court, we are commissioned to hear and determine according to the law of nations. If we had been sitting solely for the purpose of administering the municipal law of this land I should have had grave doubts as to the application of the Hague Convention; but as we are sitting to administer the law of nations, or international law, the question becomes a comparatively simple one."

The Judicial Committee expressed itself in similar fashion. In the case of the *Consul Corfitzon,*[5] their Lordships said: "the substantive law administered by the Court [of prize] is international law, which cannot be affected by the municipal legislation of any one state." Again in the case of the *Zamora,*[6] Lord Parker, speaking for the Judicial Committee, said: "The law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations, in other words, international law . . . a law which is not laid down by any particular state, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement."

Finally, it may be observed that the British foreign office likewise on various occasions during the war asserted this view. Thus in a white paper issued by it in January, 1916, relative to the measures adopted to intercept the seaborne commerce of Germany, it was said that "a Prize Court is bound by international law and not by the ordinary law of the country in which it

[1] I Lloyd 56; I Br. & Col. Pr. Cas. 38.
[2] I, *ibid.*, 301; I, *ibid.*, 163.
[3] V, *ibid.*, 161; II, *ibid.*, 210.
[4] I Br. & Col. Pr. Cas. 129.
[5] VI Lloyd 268; III Br. & Col. Pr. Cas. 8.
[6] IV, *ibid.*, 62; II, *ibid.*, 1.

sits."[1] Again in a memorandum transmitted to the United States government in April, 1916, the foreign office stated that: "in some matters it is true that the Prize Court is bound by the municipal enactments of its own country . . . but the substantive law which the Court applies as between captor and claimant consists of the rules and principles of international law, and not the municipal legislation of the country."[2]

Sec. 127. The Same (Continued). When one reads, on the other hand, the decisions of the continental Prize Courts, and particularly those of Germany, which emphasize that, first of all, it is the national law which they apply, he might conclude that there is a fundamental difference between the function and obligation of English and continental prize tribunals. In reality, however, the difference is largely theoretical and leads to no important difference of results; it is in reality a difference of point of view and of emphasis rather than of practice. The British Prize Courts in fact while proclaiming that they administer only international law, admit that they apply it only when it has received the assent of the British government given through its appropriate organs; that is, they regard the rules of international law as deriving their force and validity as law from the authority of the state in which they sit, and they acknowledge their duty to apply acts of Parliament, if not Orders of the Crown in Council, which are admittedly contrary to international law, although they will of course always endeavor to so construe municipal legislation in such a way as to make it accord with international law.[3] This was emphatically asserted by the Judicial Committee in the case of the *Zamora*[4] (1916), where Lord Parker said: "It cannot, of course, be disputed that a Prize Court, like any other court, is bound by the legislative acts of its own sovereign state. A British Prize Court would certainly be bound by Acts of the Imperial Legislature." He ad-

[1] *Parl. Paper, Misc.*, No. 2 (1916), p. 4.
[2] *Supp. to 10 Amr. Jour. of Int. Law* (Oct., 1916), p. 138.
[3] Pyke, "The Law of the Prize Court," 32 *Law Quarterly Review* (1916), p. 152; *Le Louis* (1817), 2 Dods 210; *Mortensen* v. *Peters*, 14 Scots L. J. R. 227 (1906); the *Recovery*, 6 Rob. 341; Holland, *Studies in International Law* (1898), pp. 195, 198; Cobbett, *Cases on Int. Law*, 3d ed., Vol. II, p. 192; and Wright, "Conflicts of Int. Law with National Law and Ordinances," 11 Amer. Jour. of Int. Law (1917), p. 10. The English Prize Courts, it may be observed, lay down the principle that where the consistency of an act of Parliament with international law is contested or is doubtful, there is a presumption that parliament did not intend by its act to contravene the prescriptions of international law. See the cases referred to by Picciotto, *op. cit.*, pp. 27 ff.; Holland, *op. cit.*, pp. 198 ff., and Wright, Art. cited, pp. 10-11.
[4] IV Lloyd 62; II Br. & Col. Pr. Cas. 13.

mitted, however, that if the act were inconsistent with the law of nations the Prize Court in giving effect to it would no longer be administering international law. "In that case it would of course be administering pure municipal law." Thus notwithstanding the repeated solemn assertions of the British Prize Courts that they administer only international law, they do in fact administer municipal law and regard themselves, equally with continental courts, as bound to administer it even when it is in contravention of international law.[1]

Sec. 128. The Same. Acts of Parliament and Orders in Council Distinguished. The real difference between the jurisprudence of the British and continental courts is that while the latter regard themselves as bound to give effect to orders, decrees, and regulations promulgated by the Executive, equally with legislative acts, whether they are or are not consistent with international law, it has now been settled by the *Zamora* case that the British Prize Courts although bound by Acts of Parliament which may be contrary to international law are not bound by executive Orders in Council which are so inconsistent, except where the effect of the Order is merely to mitigate the rights of the Crown. For a long time the question as to whether such an Order in Council was binding on the Prize Court remained unsettled. Sir James Mackintosh, in the case of the *Minerva*, while sitting as Recorder of Bombay under a commission of prize (probably in 1807) expressed the opinion that the Crown had no inherent prerogative to legislate for the Prize Court in such a way as to bind it by enactments which were inconsistent with international law. It would be the duty of the judge, he said, to disregard such enactments and "to consult only that universal law to which all civilized princes and states acknowledge themselves to be subject, and over which none of them can claim any authority."[2] Lord Stowell in the case of the *Fox*[3] (1811), four years later, adverting to the question as to what would be the duty of the Court under Orders in Council which were repugnant to the law of nations, observed that "this Court is bound to administer the law of nations." This, he said, was

[1] Compare Pyke, art. cited, pp. 147 ff., and Westlake, *Int. Law*, Vol. II (2d ed.), p. 317, and *Collected Papers*, 516. Westlake remarks that English courts give effect to the rules of international law not in virtue of any superior authority in that law but simply because they are required to do so by the municipal law of the British constitution. They must take their law from the authority under which they sit and for a court of admiralty that authority has never been any other than that of its own country."

[2] Quoted by Phillimore, *Int. Law*, Vol. III, p. 656.

[3] Eng. P. C. 61.

the *unwritten* law of the court, and was based upon the common usage of civilized states. At the same time, it was true, he said, that the Crown in Council possessed "legislative rights" over the Court, with power to issue orders and instructions which it was bound to obey and enforce. These constituted the *written* law of the Court.[1] These two propositions, he said: "that the Court is bound to administer the law of nations, and that it is bound to enforce the King's Orders in Council, are not at all inconsistent with each other; because these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law." Holding that the Orders in question in this case where in conformity with the law of nations, because they were justifiable measures of retaliation, he did not consider it necessary to speculate on the question of the duty of the Court in case a conflict should arise, for the reason that the Court could not "without extreme indecency" presume that the Crown by an Order in Council would violate the law of nations. While he pronounced no judgment on the question raised, there is little reason to doubt that he would have given effect to the Orders in Council notwithstanding their inconsistency with international law.[2] Thus the question was undetermined when the World War broke out. In the meantime, English jurists had discussed the question but they were divided in opinion. Some, like Sir Robert Phillimore,[3]

[1] It has frequently been emphasized that the written prize law of England has been almost wholly the work of the Crown through the exercise of the royal prerogative—a right which is not affected by non-use or lapse of time and is limited only by the unwritten law of nations, treaties, conventions, and acts of Parliament. See Marsden, "Prize Law," 15 *Jour. of the Soc. of Comp. Legis.* (1915), p. 90, and Pyke, "The Law of the Prize Court," 32 *Law Quar. Rev.* (1916), p. 153. No Act of Parliament has in fact ever interfered with the prerogative in this matter and the Naval Prize Act of 1864 expressly reserved the power of the Crown in this respect.

In the case of the *Odessa* and *Woolston* (II Lloyd 405; I Br. & Col. Pr. Cas. 568) the Judicial Committee advertising to the power of the Crown to redress hardship by way of bounty observed that "such right must still exist unless taken away by Act of Parliament, and it must be remembered that the Crown's prerogative can only be abridged by express words or necessary implication." In this case it held that the power of the Crown to exercise bounty to redress hardships had not been affected by the Civil List Acts.

[2] Compare Pyke, Art. cited, p. 155.

[3] *Op. cit.*, III, Sec. 436. Phillimore said that if Lord Stowell had believed the Orders in Council to be inconsistent with international law and had nevertheless given effect to them he would "have incurred the same guilt and deserved the same reprehension as the judge of a municipal court who executed by his sentence an edict of the legislature which plainly violated the law written by the Creator upon his conscience." Sir Erle Richards remarks that "in theory Prize Courts are international tribunals in the sense that they administer the law of nations; they ought not, therefore, to be influenced by any instructions from the sovereign, or from the executives who carry on the government of the country in his name, insofar as those

Baty,[1] Picciotto,[2] and others, ranged themselves on the side of Sir James Mackintosh and denied that the Crown could lawfully in the exercise of its prerogative bind the Prize Court by orders or instructions which were inconsistent with the generally recognized rules of international law. Westlake, on the other hand, maintained that the Crown possessed such power and adverting to Lord Stowell's discussion of the question he expressed the opinion that Lord Stowell was bound by the Orders in Council issued during the Napoleonic wars, whether he considered them justifiable according to international law or not, and that he had no choice but to give effect to them.[3]

Sec. 129. The Same. View of the British Foreign Office. In the course of the controversy which was raised with neutral countries by the British Orders in Council in the early part of 1915, the British foreign office had occasion to make certain pronouncements on the source and nature of the law administered by the British Prize Courts. In a note of July 31, 1915, to the American Ambassador at London, Sir Edward Grey stated that Prize Courts "are subject to the instructions of their own sovereign" and that in the absence of such "instructions," their jurisdiction and rules of decision "are to be ascertained by reference to the known powers of such tribunals and the principles by which they are governed under the public law and practice of nations." This he said was the view laid down in the American case of the *Amy Warwick*,[4] and it was the view of the British government. It will be noted that Sir Edward employed the term "instructions" in the place of "law" or "legislation" evidently with a view to bringing within its category Orders in Council. At the same time, it was clearly his view that the validity of Orders in Council could be challenged in the Prize Court and that if they were found to be inconsistent with international law, the Court would not be bound by them, as appears from the following passage:[5]

instructions are inconsistent with international law." But he adds: "This position has never before been insisted on by any Prize Court in any country." *Brit. Yr. Bk. of Int. Law* (1920-21), p. 13.

[1] Baty & Morgan, *War, Its Conduct and Legal Results* (1915), p. 362.

[2] *International Law and the Law of England and the United States* (1915), p. 35.

[3] *Collected Papers on International Law*, p. 516; *International Law*, 2d ed., Vol. II, pp. 155, 317. To the same effect also (apparently) Lawrence, *Principles* (Sec. 188); Cobbett, *Cases* (II, 192); and Holland, *Studies* (199).

[4] 2 Sprague 123.

[5] *Supp. to* 9 *Amer. Jour. of Int. Law* (1915), p. 164.

"The legality of these measures [Orders in Council] has not yet formed the subject of a decision of the Prize Court; but I wish to take this opportunity of reminding your Excellency that it is open to any United States citizen whose claim is before the Prize Court to contend that any Order in Council which may affect his claim is inconsistent with the principles of international law and is therefore not binding upon the Court. If the Prize Court declines to accept his contentions and if, after such a decision has been upheld on appeal by the Judicial Committee of His Majesty's Privy Council, the government of the United States of America considers that there is serious ground for holding that the decision is incorrect and infringes the rights of their citizens, it is open to them to claim that it should be subjected to review by an international tribunal."

Sec. 130. The Same. Case of the "Zamora." View of Sir Samuel Evans. The question came before the Prize Court in the case of the *Zamora*,[1] decided in June, 1915, where the legality of an Order of March 23, 1915, for the requisition of a cargo of copper consigned to Sweden was challenged on the ground that it was *ultra vires* as being contrary to international law and therefore not binding on the Prize Court. Sir Samuel Evans was here faced with a situation similar to that which confronted Sir William Scott in the case of the *Fox*. The Attorney-General argued that it was not open to a claimant to contend that an act done by the executive in defense of the realm, was *ultra vires* and that if a subject of a foreign country desired to raise the question he must do it through the diplomatic channel by an address to the foreign office. There was no case, it was said, in which a neutral had ever directly challenged the validity of an Order in Council or in which a Prize Court had not given effect to such an Order. In a long opinion in which he reviewed the decisions and the opinions of text writers Sir Samuel showed that Prize Courts were bound to apply the law of their own country even when it was not in accord with international law. At the same time he endeavored to show that the order in question was not contrary to "any acknowledged or settled principle or rule of the law of nations." Consequently he did not consider it necessary to

"discuss the question whether this Court is bound to obey an Order in Council which may run contrary to the acknowledged law of nations. If that question should arise, I am humbly and fully content to assume the standpoint of Lord Stowell in the *Fox* (Edw. 312), in which he had to deal with the Orders in Council which were made by way of reprisal after the celebrated Berlin and Milan decrees of Napoleon."

[1] 1V Lloyd 1; I Br. & Col. Pr. Cas. 309.

He concluded:

"I am not called upon to declare what this Court would or ought to do in an extreme case if an Order in Council directed something to be done which was clearly repugnant to, and subversive of an acknowledged principle of the law of nations.

"I make bold to express the hope and belief that the nations of the world need not be apprehensive that Orders in Council will emanate from the government of this country in such violation of the acknowledged law of nations as to make it conceivable that our prize tribunals, holding the law of nations in reverence would feel called upon to disregard and refuse obedience to the provisions of such Orders."

Sir Samuel, having like Sir William Scott, declined to say what he would have decided in case the Order in Council had been found to be inconsistent with international law, the question of the right of the Crown by executive order to bind the Court to apply rules in violation of the law of nations remained undetermined. The question came before the Prize Court in other cases where the validity of Orders in Council was attacked as being contrary to international law and therefore not binding on it, but as the Orders were held to be not in contravention of the law of nations the Court was able to avoid pronouncing on the question whether it would be bound to give effect to them in case of their inconsistency with international law.[1]

Sec. 131. The Same. View of the Judicial Committee. The question was finally and definitely disposed of by the Judicial Committee to which Sir Samuel Evans' decision in the *Zamora* case was appealed.[2] There the Attorney-General argued, somewhat inconsistently it would seem, that while the Court was bound to administer international law, it must follow the directions of the Crown even if they differed from that law. Their Lordships, however, made short shrift of this argument; reversed the judgment of Sir Samuel Evans; held the particular order of requisition to be invalid as contrary to international law; and declared that although the Prize Court is bound by acts of Parliament which may be contrary to international law it is not

[1] See the cases of the *Hakan*, the *Kim*, and the *Leonora*. In the *Kim* the Solicitor-General argued that in case of an alleged contradiction between an order in council and an alleged rule of international law, the presumption was in favor of the legality of the order and that if the contradiction was clear and undoubted it would be the duty of the Prize Court to give effect to the order. But since Sir Samuel found that the order in question was not in violation of any rule or principle of international law, he said he did not deem it necessary to add to, or detract from, anything he had said in the case of the *Zamora*.

[2] IV Lloyd 62; II Br. & Col. Pr. Cas. 1.

so bound by Orders of the King in Council which are in conflict with international law. They further pronounced the remark of Lord Stowell in the case of the *Fox* to the effect that the King in Council possessed "legislative rights" over the Prize Court analogous to those possessed by Parliament over the common law courts, to be a "dictum," and in their Lordships' opinion it was, "with all due respect to so great an authority" erroneous and even inconsistent with the principle enunciated by him in other cases.

Adverting to the argument of the Crown that the King in Council possessed a power inherent in the royal prerogative to bind the Prize Court by orders inconsistent with international law, Lord Parker said:

"The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by courts of law in this country is out of harmony with the principles of our Constitution. It is true that under a number of modern statutes various branches of the Executive have power to make rules having the force of statutes; but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in courts of common law or equity."

Referring also to the suggestion of the Crown that the manner in which the Prize Courts were appointed and the nature of their jurisdiction, differentiated them from other courts, Lord Parker admitted that the commission issued by the Crown to the prize judges at the commencement of war owed its validity to the royal prerogative but it could not be inferred from that fact that the prerogative included the right to prescribe or alter the law to be administered by the Prize Court. In fact, he pointed out, the commission always authorized and required the judges to hear and determine "according to the course of admiralty and the law of nations." The Prize Court therefore was bound to administer not the national, or as it is sometimes called, the municipal law, but the law of nations—in other words, international law."

"It need only enquire what that law is; but a court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and long usage by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is adminis-

tering not international but municipal law, for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction."

Finally, adverting to the argument of the Solicitor-General that even admitting that the Court would not be bound by an Order in Council which was manifestly contrary to the established rules of international law, the Court should, where there was doubt as to what the law was, follow the opinion and directions of the Executive,[1] his Lordship said:

"This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is, according to the best of its ability and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its functions as a Prize Court, and justify the confidence which other nations have hitherto placed in its decisions."

Nevertheless, the Judicial Committee while affirming that Prize Courts administer international and not municipal law, it recognized that Prize Courts are municipal tribunals and that their decrees and orders "owe their validity to municipal law." As stated above, it also admitted that the Prize Court would undoubtedly be bound by Acts of Parliament which were inconsistent with international law and that so far as the Prize Court rules (which derive their force from Orders in Council) relate merely to procedure and practice, they have statutory force and are undoubtedly binding. In short, the Crown in Council may alter the law so far as it relates to procedure and practice, but not the substantive law administered by the Prize Court. Finally, the Judicial Committee still further attenuated the effect

[1] Referring to this argument, Mr. C. M. Picciotto very pertinently remarked at the time (*International Law Notes*, March, 1916, pp. 38-39); "If this be taken as the test, then, it would appear that an Order in Council can never be invalidated in a Prize Court, for there is scarcely any principle of International Law which is of such universal application and of such immemorial standing that there is not some authority to be adduced on the other side; while on the other hand those matters with which a Prize Court would normally deal are just those which are most controversial, and which have varied from time to time according as the needs and policy of the belligerents have dictated or as the changing wheel of history has revealed former belligerents as neutrals. It is therefore little short of impossible in practice to conceive of an Order in Council which a Prize Court judge was called upon to apply ever being so grossly repugnant to settled principles of International Law that it would be disregarded."

of its judgment, by announcing that while it did not admit the right of the Crown in Council to prescribe or alter the law to be administered by the Prize Court, the Court would not ignore Orders in Council entirely, but would, on the contrary, "act on them in every case in which they amount to a mitigation of the Crown's rights in favor of the enemy or neutral as the case may be." [1]

Sec. 132. Observations on the "Zamora" Decision. The judgment of the Judicial Committee was not in all respects in accord with English authority or juristic opinion,[2] but it must now be accepted as the rule to be followed by the British Prize Courts. In solemnly affirming what British Prize Courts have so often done that they are charged with administering international law and not municipal law and yet at the same time admitting that they are bound to apply Acts of Parliament which are in contravention of international law, the effect of the principle asserted is in large measure destroyed. But under a constitution the keystone of which is parliamentary supremacy, no other decision as to this latter point was possible. As it is, the situation is not entirely satisfactory. In effect it means that

[1] See in this connection the case of the *Hakan*, where the Judicial Committee affirming a judgment of the Prize Court held that the Prize Court was not bound by an Order in Council adopting Article 40 of the Declaration of London with modifications unless the Declaration as thus modified was in accord with international law or amounted to a waiver of the Crown rights in favor of neutrals, that is, the Crown could not by Order in Council alter a rule of international law except to mitigate the rule for the benefit of neutrals. Likewise the Judicial Committee in the case of the *Proton* referring to the *Zamora* decision stated that the Crown could not by Order in Council alter the law of the Prize Court but that the Court might nevertheless act in accordance with an Order in Council varying from international law when its effect amounted to a mitigation of the rights of the Crown in favor of an enemy or a neutral. To the same effect see the cases of the *Alwina*, the *Stigstad*, and the *Oscar II*. In the latter case the Judicial Committee, referring to the *Zamora* decision, stated that if the Crown chose to waive its full rights by Order in Council in favor of neutrals the Prize Court was bound to give effect to such waiver.

[2] It was directly contrary to the opinion of Westlake and it is disapproved by Pyke (art. cited, p. 167), who thinks their Lordships did not allow sufficient weight to the peculiar constitutional prerogative of the Crown in international affairs and to the fact that originally the chief function of the Prize Court was to determine the responsibility of the nation for the acts of its commissioned cruisers. See also p. 148. Sir Erle Richards, on the other hand, approved the decision. There is an essential difference, he says, between orders made in council "on the mere advice of the executive, and statutes passed by the legislative body with the knowledge of the public and with opportunity for discussion and objection." By declaring it to be the law that Orders in Council do not bind British Prize Courts when they are inconsistent with international law the Prize Courts, he adds, have "assumed the status which they must have if they are to maintain successfully the position that they administer international law" and he ventured the hope that "the Prize Courts of other countries will in time follow this precedent and assume the same attitude of independence." *Br. Yr. Bk. of Int. Law*, 1920-21, p. 14.

while Parliament may violate the law of nations and oblige the courts to give effect to its will, the Executive cannot do so. To a neutral whose rights have been infringed by the act of a belligerent it is immaterial whether the act emanated from the executive or the legislative organ; what he ought to be in a position to demand is that neither the executive nor the legislature may compel the courts to apply a rule which denies him the rights established by international law.[1] It is well to observe, however, that the danger to neutral rights from possible Acts of the British Parliament in contravention of international law is not serious, for the reason that Parliament rarely legislates in matters of prize; on the contrary, in practice that has been the work of the Crown in Council. The decision of the Judicial Committee therefore that in the exercise of its power the Crown cannot violate international law goes far toward insuring the supremacy of international law in the matter of prize and consequently of protecting against arbitrary executive action neutrals in the enjoyment of the rights which international law gives them in respect of capture.[2]

Sec. 133. View of the German Prize Courts. The jurisprudence of the continental prize tribunals did not differ from that of the British Prize Courts in respect to the right of the legislature to enact legislation in contravention of international law and as to the duty of the Prize Courts to give effect to such legislation. In fact, it may now be regarded as a universally established principle that the acts of a national legislative body are binding upon all courts whether such acts are or are not consistent with the law of nations.[3] As has been pointed out, this principle is followed in practice by the Prize Courts of Great Britain, notwithstanding their frequent and solemn affirmations that they are charged with applying international and not municipal law.

[1] Compare J. B. Scott, 10 *Amer. Jour. Int. Law* 560.

[2] It is hardly necessary to remark also that the power of Parliament to enact legislation in contravention of international law and oblige the courts to give effect to such legislation does not alter the international responsibility of Great Britain for injuries to other States resulting from such legislation. This principle was definitely admitted by both the British and French governments during the late war. In the memoranda accompanying their acts withdrawing the Declaration of London both governments solemnly declared that the judgments of their prize tribunals would conform to the admitted rules of international law. Compare Colombos in *Report of the 30th Conf., Int. Law Assoc.*, 1921, Vol. I, p. 33.

[3] Subject to the qualification of course that in the United States and a few other countries legislative acts must not be repugnant to the constitution.

But as regards the binding effect of executive orders and proclamations, upon the Prize Courts, the jurisprudence of the continental tribunals during the late war was different from that of Great Britain. On the continent the traditional view of the function of a Prize Court is that primarily it is an organ not so much for the protection of neutral rights as for the enforcement of the responsibility of naval commanders for the observance of the orders and instructions which they receive from the appropriate authorities.[1] Consequently the Prize Courts in deciding cases which come before them rely, in the absence of treaties, primarily upon the municipal legislation, and the executive decrees, ordinances, instructions and regulations of the country in which they sit, and less upon customary international law.[2] Their decisions never abound in the declarations so frequently found in the opinions of the English Prize Courts that Prize Courts are international tribunals and that their function is to administer international law and not municipal law. On the contrary, they assert that Prize Courts are nothing but municipal tribunals; that they are bound to administer the municipal law of their states whether it is consistent with international law or not and they make no distinction in this respect between legislative acts and executive orders. This manner of view was frequently and emphatically asserted by the German Prize Courts during the late war. Thus in the cases of the *Batavier V* and the *Zaanstroom*[3] the Prize Court at Hamburg said:

"Prize Courts are national courts; they are established by their state to determine whether the legal standards to which the naval organs should adhere according to their instructions are observed or not, and to declare their conclusions thereon. From their purpose it follows that they have to judge according to the law established by their state whether or not it is in accord with the principles of international law. Whether this is the case or not, is not for the Prize Courts to be the judges, but of the belligerent states, which are alone answerable therefor to other states. The principles sustained by statements in the older literature that Prize Courts are bound to apply international law even if it does not agree with their national law must be rejected on fundamental principles."

Nevertheless, the Court held that the German prize ordinance of September 13, 1919, was not merely an "instruction" emanating from the Emperor and directed to the naval commanders but

[1] See Sec. 3 *supra*.
[2] Compare Fauchille, *Droit Int. Pub.; Guerre et Neutralité*, Sec. 1422.
[3] I *Entsch.* 118. See also Sec. 4, *supra*.

contained the law of prize to be applied by the Prize Courts.[1] The view of the Hamburg Prize Court in both cases was approved on appeal by the supreme Prize Court at Berlin.[2] The question again came before the supreme Prize Court in the case of the *Elida*[3] where it was said:

"The prize regulations contain the principles laid down by the Kaiser as commander in chief within his Imperial jurisdiction for the practice of prize law pertaining to naval warfare, and are, therefore, primarily law not only for the Navy but also for the civil authorities, particularly the Prize Courts, in so far as they have to pass upon the legality of the actions of commanders at sea falling within the prize law. International law only lays down rights and duties as between the different states. The Prize Courts, when judging of the legality of prize actions, can take general international principles only into account when the prize regulations contain no instructions, and therefore, tacitly refer to the principles of international law. Therefore, the question whether an instruction of the prize regulations agrees with general international law is not for the Prize Court to decide. If a contradiction in this connection is asserted, the point in controversy is to be settled in another manner."[4]

Sec. 134. English and German Theory Compared. Comparing the attitude of the British and German Prize Courts one is struck by what appears to be a fundamental difference in their conclusions but in effect it is, as stated above, largely a difference of point of view and of emphasis rather than of principle. The British Prize Courts assert that they are charged with administering international law but in fact they administer it only when it has received the assent of Great Britain and when it is in accord with English municipal legislation. The latter in fact is always applied, whether it is in accord with international law or not. The German Prize Courts, on the other hand, say nothing

[1] But in the case of the *Glitra* (I *Entsch.* 260) the Court denied that the prize ordinance was nothing more than "expression of the orders given by the Emperor to the naval authorities." On the contrary, much of it contained positive law. Nevertheless, Article 114 was "in reality only an order given (by the Emperor) to the commanders of war vessels. Here it is the supreme commander of the military forces who speaks and not the legislator." This distinction is open to criticism and would seem to be inconsistent with the decision in the *Batavier V* and the *Elida*, where it was said that the prize ordinance laid down the law not merely for naval officers but for the Prize Courts and other authorities. Compare Quincy Wright, XI *Amer. Jour.* 367.

[2] I *Entsch.* 118; Fauchille et De Visscher, *Jurispr. All.*, 90.

[3] I, *ibid.*, 9; English text in 10 *Amer. Jour.* 916.

[4] To the same effect see the *Koningen Regentes* (II *Entsch.* 242) and the *Prins Hendrik* (II, *ibid.*, 265). In the former case it was said: "That a German Prize Court is bound by the German prize ordinance and that it is immaterial whether and how far its provisions are in accord with the fundamental principles of international law, needs no further discussion." See also the cases of the *Eeemland* and the *Gaasterland* (I, *ibid.*, 388).

of their duty to administer international law; on the contrary, they emphatically assert that their first allegiance is to their own national law and that it is this law which they are bound to apply. The German conception of the rôle of international law and of the function of the Prize Court is therefore less elevated than that of the English Prize Courts; the latter, in theory at least, accord the place of honor to international law, as over against municipal law, but in practice where there is a conflict it is the municipal law which carries off the honors. The German doctrine is criticizable for the reason that it adopts what is believed to be an erroneous view of the function of a Prize Court as an organ for the administration of justice as between nations and unduly emphasizes the supremacy of national over international law. The English theory, although less logical in its results, because of the restrictions admitted in its application, has at least the merit of being more just, elevated and in harmony with modern conceptions of the rôle of international law.[1]

Sec. 135. View of the French Prize Council. The French Prize Council like the tribunals of other countries admitted that it was bound by the prescriptions of French municipal legislation even when they were inconsistent with the customary law of nations, and like the German Prize Courts it made no distinction between acts of parliament and executive decrees. "In France," says Dupuis, "a Prize Council would not hesitate to apply a positive legal disposition which is in formal contradiction with the principles of international law; the French tribunals, according to the constitution which governs us, have only to apply French laws; it is not permissible for them to judge their validity; the judge who disapproves them can avoid applying them, only by resigning his office."[2] Nevertheless, while the French Prize Council regarded itself as bound by the prescriptions of French municipal law even when it was not in accord with the general principles of international law, and while, apparently like the German courts, it made no distinction between legislative acts on the one hand and executive decrees, regulations and instructions, on the other, it never pronounced on the question with the same emphasis and definiteness that the German Prize Courts did, and in fact it did not apply the rule with the same rigor, but

[1] Compare in this connection the observations of Verzijl, *La Jurisprudence des Prises et le Droit des Gens*, in Grotius, *Annuaire International*, 1917, pp. 50 ff.; and De Visscher, *De La Nature du Droit Appliqué par les Cours de prises*, *Rev. Gén. de Droit Int. Pub.*, 1920, pp. 3 ff.

[2] *Droit de la Guerre Maritime* (1899), pp. 383-4.

gave the preference to the rules of international law, when they were more favorable to the rights of neutrals.[1] This was notably the case in the application of the old and rigorous prize rules of 1681, 1778 and of the year XI, still in force, under which the enemy or non-enemy character of ships and cargoes in time of war may be established solely by the ship's papers. In such cases the Prize Council derogated from the old ordinances and admitted extrinsic evidence.[2]

Sec. 136. Italian Jurisprudence. The Italian Prize Commission like the other continental prize tribunals regarded itself as bound by the decrees of the Italian government even when they were contrary to the customary law of nations. Thus in the case of the *Kyzicos No. 5*[3] adverting to articles 4 and 5 of the decree of June 3, 1915, which, contrary to article 35 of the Declaration of London, had applied the doctrine of continuous voyage to conditional contraband, the Prize Commission said: "These rules legally emanating from the government of the King and the observance of which cannot consequently be set aside by any exigency however imperative, of maritime commerce, are certainly applicable to the cargo of the steamer *Kyzicos*." Similarly in the case of the *Mikail*[4] the Prize Commission adverting to measures adopted by the naval authorities for the maintenance of the blockade of the Adriatic Sea (in execution of a government decree) stated that it would be an excess of power for it to judge of the necessity of the measures taken or of their consistency with international law.

> "When it is a question of acts of the military authority done in the exercise of the power which has been conferred upon it for the conduct of military operations, all control over the motives which led this authority to exercise it, is beyond the competence of the Prize Commission, whose function is to judge solely the legality of captures which [legality] must always be affirmed when there exists, as in the present case, a disposition for navigation, made by the maritime military authorities in virtue of powers conferred upon it by law."

Thus although an Italian Prize Court is called upon to judge of the validity of captures, which in the last resort depends upon

[1] Fauchille, *op. cit.*, Sec. 1433, p. 581; and Verzijl, *op. cit.*, p. 12.

[2] The *Czar Nicolai II* (Council of State, Fauchille, *Jurispr. Franc.*, 258), the *Rosita* (*ibid.*, 107) and other cases cited by Verzijl, *op. cit.*, Sec. 206. It may be observed in this connection that the somewhat difficult task of reconciling the mass of partly contradictory *règlements décrets*, and *arrêtés* promulgated at different times during the 17th, 18th and 19th centuries which in their ensemble constitute the French law of prize, devolved upon the French Prize Council.

[3] Fauchille et Basdevant, *Jurispr. Ital.* 64.

[4] *Ibid.*, 216.

the prescriptions of international law, it has no jurisdiction to judge the question whether the naval authorities have exceeded their powers in the execution of a government decree.

Sec. 137. Jurisprudence of Other Countries. The Belgian Prize Council, however, in the case of the *Agiena*[1] stated definitely that it was not bound by national law in case it is in conflict with international law. Among the *considérants* upon which the decision was based the two following may be quoted: "Whereas, it is accordingly quite immaterial whether the question in dispute is or is not covered by Belgian law, from the moment when it has been established that its solution can be derived from other sources on an equal, or a superior degree, of international law" and, "whereas, the circumstances that the Council should necessarily render judgment in accordance with the principles of this law and is not bound by national laws, rather constitutes for the interested parties a guarantee of impartial justice."

The Prize Courts of no other countries appear to have pronounced opinions on the question.[2]

Sec. 138. Application of Municipal Law by Prize Courts. While the British Prize Courts often asserted that they administered international and not municipal law, in fact they were frequently called upon to interpret and apply the prescriptions of their own and sometimes of foreign municipal law. For the most part, the prescriptions of English municipal law were found in the various Orders in Council issued from time to time. In view of the fact that Parliament has rarely legislated in respect to the law of maritime prize, but has left that power to the Crown in Council, the Prize Courts seldom had occasion to interpret or apply Acts of Parliament, except in matters of Prize Court procedure, or in respect to matters lying outside the domain of prize law, strictly speaking. In connection with matters of procedure we find frequent references in the decisions to the "Naval Prize Acts" and the "Prize Court Acts" of 1864, 1894, 1914 and 1915. Other Acts of Parliament sometimes referred to and relied upon were the "Sale of Goods Act" of 1893 relative to

[1] *Moniteur Belge*, 1920, p. 405.

[2] It may be remarked, however, that the Japanese Prize Court during the Russo-Japanese war expressed the opinion that the regulations of Feb. 27, 1904, respecting captures at sea were not binding upon the Prize Court; nevertheless it added that the Court "shall take them as a standard and shall give decisions so as not to conflict with the spirit of the regulations." Takahashi, *International Law Applied to the Russo-Japanese War* (1908), p. 563.

the transfer of ownership of property and the risk of loss;[1] the "Merchant Shipping Act" of 1894 relative to merchant vessels;[2] the "Territorial Waters Jurisdiction Act" of 1878;[3] and the "Bills of Lading Act" of 1885.[4] In the case of the *Miramichi*[5] Sir Samuel Evans held that the English common law rules governing the transfer of property were not applicable by the Prize Court in determining the question of the passing of property from enemy to neutral persons in maritime war. So in the case of the *Helena*[6] he proceeded on the principle that the law of the Prize Court in respect to the allowance of freight was different from that applied by the common law courts. In the case of the *Odessa*[7] he refused to apply the special rule of English municipal law relative to the rights of mortgagees and pledgees of property for the purpose of determining the ownership of enemy ships or goods of which neutrals were pledgees. Under the rules of municipal law pledgees have some sort of "special" or "beneficial" proprietary right over the property, but this could not be invoked in a Prize Court to establish a general property right in the sense of prize law. In other words, the Court ignored the special property right which the municipal law of England created and applied the general rule "recognized by all civilized nations." The judgment in this case was affirmed by the Judicial Committee on appeal, and was reaffirmed in the case of the *Parchim*.[8] Here the Judicial Committee in determining the question to whom property in captured goods belonged relied upon "The Sale of Goods Act, 1893" which was described as "a very successful and correct codification of this branch of mercantile law" being based upon "the mercantile usages common to all nations." But their Lordships added, that if the parties contracted with reference to a foreign municipal law which was proved to be different in any material respect from English law, that fact would be taken into

[1] See, among others, the cases of the *Miramichi*, the *Marquis Bacquehem* and the *Parchim*. As to this subject see also Secs. 350-355, *infra*.

[2] The *Tommi* and *Rotherstand*, the *Marie Glaeser*, and others.

[3] *Floating Craft of the Deutsches Kohlen Depôt, Port Said* (II Br. & Col. Pr. Cas. 439).

[4] The *Syria* (II Lloyd 100).

[5] I Lloyd, 157; I Br. & Col. Pr. Cas. 137. In this case reference was made to the decision in the *Ida* (2 Eng. P. C. 268), where Dr. Lushington, referring to a contention that the law of the Prize Court in respect to the ownership of property was the same as the common law, said: "If you can establish that the common law and the law of the Prize Court as to property or ownership are identical, you will prove wonders."

[6] I Br. & Col. Pr. Cas. 618. [7] I Lloyd 301; I Br. & Col. Pr. Cas. 163.

[8] IV, *ibid.*, 390; II, *ibid.*, 489. In the case of the *Parana* (VIII, *ibid.*, 220; III, *ibid.*, 482), Lord Sterndale held that the question whether the shipper was to be regarded as the owner of "innocent" goods must be determined by prize law and not municipal law.

consideration in determining their intention with regard to the passing of the property. Having regard, however, to the presumption that the general law of a foreign country is the same as English law, the mere fact that the contract was entered into with reference to the law of another country was immaterial.

The German Prize Courts, which as has been said, based their decisions first of all upon German national law, and especially upon the prescriptions of the "prize ordinance" and the "Prize Courts ordinance," sometimes, like the English courts, invoked the principles of German civil and commercial law. Thus in the case of the *Eskimo* [1] the supreme Prize Court relied in part upon the prescriptions of German, Norwegian, and English law relative to the transfer of property through the cession of bills of lading. In the case of the *Lupus* [2] the supreme Prize Court invoked the prescriptions of the German commercial code and based the right of the captain of a ship to appear before the Prize Court, upon both German and Norwegian law.

The French Prize Council in a large number of decisions which it rendered invoked *arrêtés*, ordinances and decrees emanating from the governmental authorities, many of them of ancient date. Likewise it occasionally relied upon the prescriptions of French civil and commercial law and sometimes of the code of civil procedure.[3] The practice of the Italian Prize Commission was the same.[4]

[1] I *Entsch.* 382; Fauchille et De Visscher, *Jurispr. All.* 292. See the quotation in Sec. 373 *infra.*

[2] II, *ibid.*, 377; *ibid*, 287.

[3] Among others see the cases of the *Appollonia* (Fauchille, *Jurispr. Franc.* 66), the *Narrovian* (*ibid.*, 68), the *Barmbek No. 2* (*ibid.*, 270) and the *Lloyd* (*ibid.*, 332).

[4] See notably the cases of the *Kyzicos No. 5* (Fauchille et Basdevant, *Jurispr. Ital.* 57), the *Aghios Caralambos* (*ibid.*, 11) and *La Bella Scutarina* (*ibid.*, 45).

CHAPTER V

RIGHT OF CAPTURE IN MARITIME WAR

I

When Right of Capture and Condemnation May Be Exercised

Sec. 139. Right of Capture Exists Only During State of War. The right of capture can, of course, be legally exercised in respect to enemy property only when the captor State is actually in a state of war with the power whose vessels or other property are the object of seizure. Whether such a state of war exists is a matter for the political department of the government to determine and does not fall within the jurisdiction of the Prize Court; but if the former recognizes the existence of war, the Prize Court is bound by a declaration to that effect.[1]

Sec. 140. Effect of Armistices and Treaties of Peace. In the absence of treaty stipulations to the contrary captures made after the conclusion of peace are null and void. The right of capture may be, and usually is, suspended by the conclusion of an armistice.[2] The armistice concluded on November 11, 1918, between the delegates of Germany and Marshal Foch, representing the allied and associated Powers, provided for an immediate cessation of hostilities at sea, but it expressly declared that the

[1] See the decision of the Roumanian Prize Court in the case of the *Nicolae*, a Bolshevist motor boat captured by a Roumanian war vessel in the Black Sea on July 2, 1919, cited by Verzijl, *op. cit.*, Sec. 132; also the decision of the French Prize Council condemning two Russian tugs flying the Red flag, captured in May, 1919, by the naval forces of France between whom and the Russian Bolshevists the French government recognized a state of war. The *Volea* (or *Volia*) and the *Chalutier No. 20* (28 *Rev. Gén.*, 1920, *Jurispr.*, p. 10). As to whether Albania and Egypt were neutral states see Sec. 174 *infra*. In various other cases Prize Courts were called upon to decide whether a state of war existed in fact at the time particular captures were made. See, among others, the Austro-Hungarian cases of the *Mukhbir-i-Sürur*, the *Halil* and the *Fiore Albania;* the Belgian cases of the *Elbing* and others, the *Feronia*, the *Zora* and various others and the French cases of the *Mahrousseh*, the *Kassed Kerim* and others.

[2] The Italian prize regulations of 1917 (Art. 6) direct that vessels captured after suspension of hostilities shall be released even when the master of the vessel making the capture is ignorant of the suspension.

blockade of Germany should be continued and that German merchant vessels encountered at sea remained liable to capture.[1] In the case of the *Rannveig* [2] the British Prize Court, and the Judicial Committee on appeal, held that the armistice did not allow the carriage of contraband by a neutral vessel to a German port between the date of the armistice and the conclusion of peace and consequently a cargo of fish seized during this period on a Norwegian vessel destined to a German base of supply was condemned. Thus both enemy vessels and neutral vessels carrying cargoes of contraband continued to be liable to capture during the period of the armistice.[3] By the terms of the armistice Germany, on the contrary, was not only required to renounce the right of capture but to release all neutral merchant vessels previously seized and to discontinue prize proceedings already begun against them.[4] The clause relative to the liberation of neutral vessels was invoked before the Belgian Prize Council by the original owners (Dutch) of certain neutral vessels which had been captured by the Germans in 1916 and 1917, and condemned by the German Prize Court for carrying contraband and subsequently recaptured (Oct. 1918) by the Belgians, as a ground for their release, but the contention was rejected for the reason that in the opinion of the Prize Council the clause did not apply to ships such as these, the title to which had passed to the enemy by decision of the German Prize Court and recaptured by the Allies on the eve of the armistice.[5]

Sec. 141. Effect of Treaties of Peace on Prize Proceedings. Unless otherwise specifically provided by treaty, the conclusion of peace does not operate to suspend prize proceedings already begun nor to prevent the institution of proceedings after the conclusion of peace against vessels captured prior thereto. In fact a large number of the decisions of the prize tribunals

[1] Articles 20 and 26. Similar clauses in the armistice with Austria-Hungary but not in those with Bulgaria and Turkey.

[2] IX Lloyd, 380; III Br. & Col. Pr. Cas., 740.

[3] See also the cases of the *Almazora*, the *Pena Castillo* and the *Luis* in which the French Prize Council condemned enemy cargoes seized on board neutral merchant vessels after the conclusion of the armistice. 27 *Rev. Gén.* (1920), *Jurispr.*, pp. 72, 77, 82. Various German vessels captured subsequent to the conclusion of the armistice were condemned by the Prize Courts. Among others are the *Elbe* (27 *Rev. Gén.*, 1920, *Jurispr.*, p. 64); the *Möwe* (*ibid.*, 81); the *Meta* (*ibid.*, 88); the *Peter Rickmers* (*ibid.*, 99); the *Odessa* (*ibid.*, 103); the *Italia* (*ibid.*, 66); the *Berger* (*ibid.*, 68), etc.

[4] Articles 20 and 29. But the German Supreme Prize Court as late as February, 1920, upheld the condemnation by the lower court of neutral vessels captured on the eve of the armistice. See the cases cited by Verzijl, *op. cit.*, p. 245.

[5] See notably the cases of the *Midsland* and the *Gelderland* (47 *Rev. de Droit Int.*, 1920, pp. 119, 125).

arising out of captures made during the World War were rendered after the conclusion of the treaties of peace, some indeed as late as the year 1924. All of those rendered by the Belgian Prize Council were, in fact, made in October, November, and December, 1919, the Council not having been definitely established until August of that year.[1]

II

Where Captures May Be Made

Sec. 142. Questions Raised. Lord Mersey, speaking for the Judicial Committee of the Privy Council in the case of the *Odessa*[2] said "all civilized nations up to the present time have recognized the right of a belligerent to seize with a view to condemnation by a competent court of prize, enemy ships found on the high seas or in the belligerent's territorial waters, and enemy cargoes." Does the jurisdiction of a Prize Court extend also to captures made by the naval forces, the land forces, or the port authorities, of enemy ships and cargoes in the ports or on shore of the belligerent by whom the capture is made? And does it extend to captures made by the naval forces in the interior, on land, on the inland lakes, and on the rivers of the opposing belligerent?

It is sometimes difficult to distinguish between operations which fall within the domain of land warfare and those which should be classed as acts of naval warfare, for the line which separates them is not clearly drawn. It is necessary, however, to determine the line, for the law of capture applicable to the two kinds of warfare is materially different. If the capture is governed by maritime law, especially if neutral property is involved, prize proceedings are necessary; on the other hand, if it is governed by the law of land warfare there is no necessity for prize adjudication. If it is a case of capture in land warfare the Second Hague Convention of 1899 or the corresponding Fourth Conven-

[1] There is some opinion in favor of the view that the jurisdiction of a prize tribunal should cease with the conclusion of peace (see Fauchille, *Droit Int. Pub.*, t. II, p. 590, and the opinions there cited), and it has been so provided in some treaties of peace, for example, the Treaty of Brest-Livtosk of March 3, 1918: the treaty of March 7, 1918, between Germany and Finland; and the treaty of May 7, 1918, between Germany and Roumania. But no such provisions were inserted in the treaties of Versailles, St. Germain, Trianon or Neuilly.

[2] II Lloyd, p. 421; I Br. & Col. Pr. Cas., p. 559.

tion of 1907 are applicable; if the operations are maritime in character they are governed by the Sixth and Ninth Conventions of 1907.[1] Where, therefore, doubt exists as to the character of the operations and therefore as to the law applicable, the Prize Court is obliged to decide the question.

Sec. 143. Captures in Territorial Waters and Ports. Seizures of enemy vessels in the territorial waters, harbors, and ports of the captor State were made by the naval forces or the civil authorities of all the maritime belligerent powers and in the case of those in which Prize Courts were set up the ships seized were generally condemned as good prize or were ordered to be detained until the end of the war or until further order of the Prize Court and no question was ever raised as to the validity of the seizures by reason of the places where they were made.

Many captures were likewise made in the territorial waters, harbors, and ports of the enemy or in those of States occupied by the enemy and were the objects of prize adjudication.[2]

Sec. 144. Captures in Rivers and Other Interior Waters. A goodly number of captures were made in the rivers and fluvial ports both of the captor State and of the enemy State or of territory under his occupation. Thus German and Austro-Hungarian ships were captured by the Belgian authorities in the ports of Antwerp, Bruges, and Ostend upon the outbreak of the war. Reseized by the Germans upon their occupation of Belgium they were retaken by the Belgians on the eve of the armistice and condemned by the Belgian Prize Council.[3] Among the vessels

[1] As to this matter compare the observations of Professor Manley O. Hudson in an article entitled "Seizures in Land and Naval Warfare Distinguished," 16 *Amer. Jour. of Int. Law* (1922), pp. 375 ff. Unfortunately the prize regulations of States are not always specific in defining the places where maritime captures may be made. The Instructions of June, 1917, for the Navy of the United States governing Maritime Warfare (Sec. 62) state that enemy vessels are liable to capture "outside of neutral jurisdiction." Some declare that captures may be made "in any waters except the territorial waters of a neutral State." The French "Instructions" of 1912 (revised 1916) appear to contain no pronouncement at all on the subject. The Italian regulations of 1917 (Art. 5) forbid captures in the territorial waters of neutral States and in neutralized waters but authorize it "on the sea and in interior waters open to maritime navigation." The Turkish regulations (1912) authorize the seizure of boats and cargoes by sea and by land forces. The Roumanian prize code authorizes captures to be made in the territorial waters, maritime and fluvial, of the enemy.

[2] The cases are too numerous to be enumerated here. In the case of the *Souhl*, ex *Corcovado* (27 *Rev. Gén.*, 1920, *Jurispr.* 60), the French Prize Council declared that a capture might be legally made in the ports and harbors of an enemy state, even after the conclusion of an armistice with such state.

[3] See, for example, the cases of the *Feronia*, *Delos*, *Gratia*, *Midsland*, and others, 47 *Rev. de Droit Int.* (1920), pp. 118 ff. and 271 ff.

captured by the Germans was a Belgian yacht, the *Primavera*,[1] the owners of which contested before the Prize Court the validity of the capture, among other reasons, because it was captured not at sea but in the port of Antwerp, that is, in the interior of Belgium and was therefore an act of land warfare and not a case of maritime capture. In consequence, the case was, they argued, not governed by prize law but by the principles of land warfare and the Prize Courts had no jurisdiction. The Prize Court briefly disposed of this argument by saying that it was without value, as had already been decided in the case of the *Primula*. (Sec. 146 *infra*.) An incidental point decided was that prize law applied not only to captures of vessels made by war ships but also those made by land troops and port authorities. Another similar case which came before the German Prize Court was the *Comte de Smet de Naeyer*,[2] a Belgian sailing vessel seized by the Germans in the port of Antwerp. Adverting to the place of capture the German Supreme Prize Court said the question whether the port of Antwerp was a theater of maritime war might be left aside. "The right of capture," it added, "may be exercised not only in the theater of war but wherever there is maritime navigation, consequently not only on the high seas but also in gulfs and in ports which serve maritime navigation. This applies to the port of Antwerp although the mouths of the river Scheldt are not in Belgian territory."

The Roumanian authorities captured various enemy vessels on the Danube. In the case of the *Emilie* the Roumanian Prize Court released one of the vessels so captured, though not for the reason that it was captured on a river in the interior. In fact the Roumanian Prize Code (Art. 24) expressly authorized captures in the fluvial waters of the country.[3] Various seizures made by the British forces on the Euphrates, Tigris and other

[1] I *Entsch.*, 194; Fauchille et De Visscher, *Jurispr. All.*, 147.
[2] I, *ibid.*, 209; *ibid.*, 159.
[3] Among the claims filed before the American arbitrator (Walker D. Hines) under Article 300 of the Treaty of St. Germain was a claim by the Roumanian government that the seizures of these vessels should be governed by the law of naval warfare and hence the validity of the seizures should be sustained. The arbitrator, however, rejected the claim on the ground that the vessels were engaged in inland rather than maritime navigation and had not been captured at sea. The fact that they were seized on a river by naval officers did not give the seizures the character of maritime captures and they must therefore be governed by the law of land warfare which forbids the capture of private property. See Hines, "Determination in the Matter of Questions Arising as to Danube Shipping," p. 21, cited by Hudson, 10 *Amer. Jour.*, p. 385. The Russian Prize Court upheld the validity of captures on the inland waters of the Danube. (See the *F. B. Mendl*, Jan. 28, 1916.)

rivers were upheld as lawful acts of maritime capture over which the Prize Court had jurisdiction.[1]

Sec. 145. Italian and French Cases. Seizures on Rivers. In the case of the *Cervignano* and *Friuli*[2] the Italian Prize Commission took jurisdiction and upheld the legality of the capture of enemy vessels (Austrian) on rivers and interior waters of the enemy country on the ground that it was the duty of the Italian government as a belligerent to destroy so far as it could the military, political, and economic power of the enemy. To regard as inapplicable the right of maritime capture in fluvial ports of rivers which serve as a continuation of maritime navigation, would, it said, have this effect, namely, that while the enemy might, as occasion offered, penetrate Italian rivers and make captures thereon, Italy would be debarred from similar operations, contrary to the political reason which justifies the right of reprisal. "It was not doubted that the navigation practiced by the *Cervignano* and the *Friuli* on the river Aussa and its mouths at Grado and Trieste across the gulf presented the characteristics of fluvial navigation effected in continuation of maritime navigation." Ships navigating such rivers were therefore liable to capture and confiscation without regard to the point on the river, or the lake or the sea where they were seized, and it belonged to the Prize Court to determine the legality of the captures.[3]

In the case of the *Leonilda* and *Ottilia*[4] the Italian Prize Commission condemned certain small Austrian craft captured on the Austrian river Isonzato. The fact that the captures were made on a river did not, it was held, affect the legality of the seizure as maritime prize. The Italian Prize Regulations of 1917[5] authorize captures at sea and on interior waters open to maritime navigation and forbid it only in the territorial waters of neutral powers and in neutralized waters. This restriction, said the Prize Commission, flows from the necessity of distinguishing between open zones and those closed to the operations of belligerents but it was not intended to establish a difference between territorial maritime waters and the fluvial waters of a belligerent, because otherwise an enemy ship liable to capture could escape capture by the sole fact of ascending a river. And it added

[1] See the cases cited in Sec. 45, *supra*.
[2] Fauchille et Basdevant, *Jurispr. Ital.*, 178. As stated above the Italian prize regulations (Art. 5) expressly authorize captures in "interior waters open to maritime navigation."
[3] See also Sec. 184, *infra*.
[4] *Ibid.*, p. 194. See also Sec. 185, *infra*.
[5] Article 5.

that if one wished to deduce from the place of capture a reason for determining the particular character of a ship, it would be necessary that between the ship and the place where it is captured there should be a permanent *lien* qualifying the ship for a particular and exclusive destination. That is to say, the ship should be utilizable only on the river; in the present case, on the contrary, there was nothing to prevent the ships from being utilized for the coasting trade or for maritime navigation along neighboring coasts.

In a series of other cases,[1] the Italian Prize Commission condemned various Austro-Hungarian boats which had been seized on an arm of the Isonzato River which was non-navigable but which the Commission considered to be an accessory of the sea and as a place of refuge or cover. The boats had been employed not only in river navigation but in the petty coasting trade and even in maritime navigation along the neighboring coasts, their presence in the river being only occasional and transitory.

Sec. 146. Case of the "Primula." Several captures on rivers were made by the German forces and their legality was upheld by the Prize Courts. The case of the *Primula*,[2] referred to above (Sec. 144), involved the validity of the capture of a Russian steamer on the river Trave between the ports of Lübeck and Travemünde. In holding the seizure to have been a lawful act of maritime capture, the Supreme Prize Court, affirming the judgment of the Prize Court at Kiel, declared that the exercise of the right of capture was not limited to the high seas but extended to all waters which serve maritime navigation. The Italian Prize Commission in the case of the *Cervignano* and *Friuli* referred to this case and also to the seizure by the German authorities of certain Belgian ships in the German port of Duisburg on the Rhine. The Prize Council of France appears to have been the only prize tribunal which declared itself without jurisdiction of captures made on lakes and rivers.[3]

Sec. 147. Seizure in Tanks on Shore. The "Roumanian." Does the law of maritime capture apply to seizures of enemy cargoes on the docks, wharves and quays of a port or in ware-

[1] *Ibid.*, p. 199. Among the craft seized were several which were the property of the Austro-Hungarian State and which were not war vessels and to which the Merchant Marine Code did not apply. But on the basis of Article 53 of the IV Hague Convention of 1907 the right of the Italian government to appropriate them without a prize judgment was affirmed. Compare also the case of the *Beleno* mentioned in Sec. 155, *infra*, involving the seizure of a boat in dry dock.

[2] *Entsch.* 17; Fauchille et De Visscher, 14.

[3] The *Rohlfs* (dec. of May 5, 1915).

houses, reservoirs, tanks, etc., which may be regarded as dependences of the port? The first and most important case during the World War involving this question was that of the *Roumanian*,[1] which came before the British Prize Court in November, 1914. A cargo of oil belonging to a German company and shipped on a British steamship at Port Arthur, Texas, before the outbreak of the war for delivery at Hamburg was diverted to London where the oil was seized by the customs authorities and discharged by means of pumps and pipes into tanks situated on land some 150 yards from the wharf. The Crown asked for condemnation by the Prize Court of the oil as "droits of admiralty." The Attorney-General argued that the oil, although discharged in tanks on land was nevertheless seized "in port" since a "port" consisted not merely of the water where ships anchor but also of quays, wharves, cranes, and warehouses. It was well settled, he contended, that the prize jurisdiction extends to seizures made in the "ports" of the capturing belligerent (*Pratt's Story*, p. 28) and the jurisdiction of the Prize Court is not ousted merely because the goods are landed (*Lindo v. Rodney*, 2 Dougl. 513 n, and the *Two Friends*, 1 C. Rob. 271, 282, 283). Counsel for the claimants contended, on the other hand, that the oil had been landed before it was actually seized and having been captured on land the jurisdiction of the Prize Court did not extend (*Pratt's Story*, p. 28, and *Brown v. The United States*, 8 Cr. 110). By the terms of the Naval Prize Act its jurisdiction in cases of capture on land was limited to public property captured by an expedition and did not extend to property captured on land by the land forces exclusively. The decision in *Lindo v. Rodney*, he argued, was not applicable since the seizure in that case was made by the naval forces in hostile territory, not by the customs authorities.

Sir Samuel Evans held that the tanks on shore were "oil warehouses," that the oil seized therein was seized "in port"; that it was seizable even if it was strictly "on land" and not "in port"; that the Prize Court had jurisdiction of such seizures and that the oil should be condemned as "droits of Admiralty." The learned judge after quoting the opinion of Hall[2] and Dana[3] regarding the right of capture and the relaxations from the right of the ancient practice which had been introduced, said he would start with the broad proposition that all enemy property—ships

[1] I Lloyd 191; I Br. & Col. Pr. Cas. 75.
[2] *International Law* (6th ed.), p. 435.
[3] Wheaton (8th ed.), p. 451 n., 171.

and cargoes—might after the outbreak of war be captured *jure belli* on the sea or in rivers, ports and harbors of the country and that the jurisdiction of the Prize Court and it alone, extended to all such captures. This jurisdiction, he said, had never been doubted. The cargo of the *Roumanian* was an enemy cargo and as such it was subject to capture as prize on the high seas or after arrival in a British port. The *Roumanian* was not bound to come into a British port, yet he admitted that it could not have proceeded to Hamburg for delivery of the cargo, for that would have amounted to trading with the enemy; nor would it have been practicable to remain at sea because it would have been captured by the Germans. It could not very well have pumped the oil into the sea, and if it had done so, the owners of the vessel would have lost whatever claims they might have had to freight. It was practically bound, therefore, to enter a British port with the oil on board. Yet it had no strict right to bring the cargo in and to expect protection for the enemy owners of the oil. It came in as enemy merchandise and was subject as such to seizure. That part which had been pumped into tanks on shore was no less liable to seizure than that which remained at the other end of the pipe in the ship. Any distinction between them would be "pedantic and erroneous." The word "port" in respect to the seizure of enemy goods carried by a ship meant something more than the port covered with water in which the ship was anchored. Counsel for the claimants, he said, conceded that a wharf was part of the "port." The hundred yards or more which separated the tanks from the edge of the wharf did not alter the situation. He then quoted Sir Mathew Hale [1] as authority for the view that "warehouses" are a part of the "port" which they serve. In the present case the oil tanks were assimilable to "warehouses." He then cited the opinion of Lord Stowell in the case of the *Two Friends* [2] as authority for the view that the jurisdiction of the admiralty court extended to the capture of goods which had been landed on shore. The decision of the United States Supreme Court in the case of *Brown v. The United States* relied upon by counsel for the claimants, although an "interesting and illuminating case" was, he thought, not applicable in the present case. In that case the Supreme Court held that British property which had been landed could not be condemned as enemy property in the absence of a legislative act authorizing its confiscation. It was a case of property seized on land and not in port and

[1] *De Portibus Maris*, cap. II. [2] 1 C. Rob., 271; 1 Eng. P. C., 136 n.

the property was, unlike the oil in the present case, found there at the commencement of hostilities. Other cases cited by Sir Samuel were 103 *Casks of Rice* [1] where the United States District Court of New York held that a seizure of goods in a warehouse on land was in law a maritime seizure; the case of the *Thalia* [2] in which the Supreme Court of Japan held that the seizure of a Russian vessel which had been placed on dry land near a repairing dock was a case of maritime capture and therefore within the jurisdiction of the Prize Court; and a number of un-reported early English cases in which the admiralty jurisdiction was held to extend to the seizure of enemy goods in port or in warehouses on land.

Upon appeal to the Judicial Committee of the Privy Council the judgment of the Prize Court was affirmed.[3] Adverting to the contention of the appellants that it was the local situation of goods seized as prize which determines the jurisdiction of the Prize Court and that if at the time of seizure they are on land and not afloat the prize court has no jurisdiction, Lord Parker remarked that the local situation might be of importance but it was the seizure as prize and not the local situation of the goods which conferred jurisdiction on the Prize Court. Turning then to the contention of the appellant that even if the Prize Court had jurisdiction it should have decided against the condemnation of that part of the oil which was seized ashore because it was not a case of maritime capture, Lord Parker said that the oil was unquestionably enemy property and it was on the high seas at and after the declaration of war and became liable to seizure as soon as war was declared, and counsel for the appellants had failed to suggest any satisfactory reason why it ceased to be so liable when pumped into the tanks on shore although they had been asked to do so. There was, he said, no ground for their assumption that the goods were seizable only when they were afloat. The test of ashore or afloat was no infallible test as to whether goods can or cannot be lawfully seized as maritime prize. It was perfectly clear that they could be seized in enemy territory by the naval forces and lawfully condemned by a Prize Court. The conclusion of their Lordships was therefore that enemy goods in British ships, whether on board at the commencement of hostilities, or embarked during the hostilities, had always been and were still

[1] Blatchford's Prize Cases, 211 (1862).
[2] Hurst & Bray, *Russian and Japanese Prize Cases*, Vol. II, p. 116, 1905.
[3] II Lloyd, 378; I Br. & Col. Pr. Cas. 537.

liable to seizure as prize, either on the high seas or in the ports or harbours of the realm.[1]

Sec. 148. Case of the "Eden Hall." Seizure in Bonded Warehouse. A somewhat similar case was that of the *Eden Hall*[2] which involved the liability to capture as maritime prize of goods shipped by a Turkish subject on a British ship consigned to order and which upon arrival at the port of London before the outbreak of war between Great Britain and Turkey were discharged into a bonded warehouse where subsequent to the outbreak of war they were seized as prize. The claimants readily admitted that after the decision of the Privy Council in the case of the *Roumanian* a bonded warehouse must be regarded as a part of the port, but they distinguished the two cases by reason of the fact that in the present case the goods arrived and were removed to the warehouse *before* the outbreak of war. The effect of the outbreak of hostilities, they argued, ought not to be made retroactive so as to condemn innocent transactions which had been fully completed before the outbreak of war. The principle laid down in the case of the *Roumanian* was not therefore applicable to the present case and the goods should be restored. Sir Samuel Evans, however, condemned them. He admitted that some of the facts in the two cases were different but he thought there was no distinction of principle. Upon the broad ground that the goods were in a warehouse belonging to the port at the time of the outbreak of hostilities they were a proper subject of maritime prize. Sir Samuel intimated, however, that if instead of being consigned "to order" the goods had been consigned to a specifically named consignee of non-enemy nationality, and he had put forward a claim thereto, the decision might have been different, but since they were put into the warehouse as the goods of a Turkish subject and remained there as such until he became an enemy they must be condemned.[3]

[1] The plea put forward before the Judicial Committee, that the goods on the *Roumanian* were protected from capture by the Declaration of Paris was rejected. As to the decision of the Judicial Committee on this point see Sec. 240, *infra*.

To the same effect see the case of the *Syria* (II Lloyd, 100) where the goods were landed from an English vessel and seized on the quay; and the *Guilford Castle* (South Afr. Prize Court Decisions, 87) where they were landed from an English vessel and deposited in the "King's warehouse" at Durban. The same rule was applied to enemy goods brought into port by mistake and against the will of the owner. *La Palma* and *Beira* (*ibid.*, 93). The Court denied that any distinction could be made between enemy goods voluntarily landed in port and those landed against the will of the owner.

[2] V, Lloyd, 20; II, Br. & Col. Pr. Cas., 84.

[3] Compare also the case of the *Schlesien No. 2* (IV, Lloyd, 324; II, Br. & Col. Pr. Cas., 268) involving neutral goods landed and seized in a British

Sec. 149. The Same. Case of the "Glenroy." A similar case was that of the *Glenroy* [1] which involved the liability to condemnation of a German cargo consigned "to order" on a British ship which sailed from Shanghai *before* the outbreak of war, bound for Antwerp and Bremen. After the outbreak of war she was diverted into the port of London, where the cargo, being unclaimed and of a perishable nature, was sold by the shipowners and the proceeds handed over to the admiralty marshal by whom they were seized as prize. The only difference between this case and that of the *Eden Hall* was that the goods arrived *after* the outbreak of war and were therefore presumably enemy goods at the time of arrival and were not therefore discharged into a bonded warehouse and subsequently seized. The distinction was not however regarded as material. Since they were consigned "to order" and were unclaimed, they were presumed to be enemy goods and as such were liable to seizure in port. The fact that the shipowners had sold the goods and handed over the proceeds to the admiralty did not prevent the Prize Court from dealing with them as it might have dealt with the goods themselves. The acts of sale merely converted the goods into money and the latter was as much subject to seizure and condemnation as the goods themselves, nothing having intervened in the transaction to change their character.[2]

Sec. 150. The Same. Case of the "Achilles." In the case of the *Achilles* [3] substantially the same question was presented to the British Prize Court as was involved in the case of the *Roumanian* except that the enemy goods, which consisted of a cargo of hides laden on a British ship, were removed from the ship in the port of Liverpool and placed in a warehouse on land where they were subsequently seized as prize. The claimants argued that this circumstance distinguished materially the case from the *Roumanian.* In the latter case the goods were "driven on to land by the exercise of belligerent sea power" and were therefore liable to seizure as prize. But where they were brought on to land as in the present case not by the exercise of sea power but in the course of the due performance of a commercial adventure and subsequently seized at a place which was outside the limits of the port, they were not confiscable as prize. Sir Samuel Evans

port but which some days afterwards became enemy goods in consequence of the outbreak of war between Great Britain and Austria-Hungary.

[1] VII Lloyd, 200; II Br. & Col. Pr. Cas., 161.

[2] To the same effect see the cases of the *Clan MacTavish* and the *Ballarat* (VII, Lloyd, 160); and the *Soldier Prince* (*ibid.*, 163).

[3] VII, Lloyd, 1; II, Br. & Col. Pr. Cas., 544.

held, however, that the distinction was not well-founded. The warehouse he said was in the port of Liverpool. For this reason and on the broader ground stated by the Privy Council in the case of the *Roumanian,* that enemy goods which are subject to capture while afloat remain subject to capture after they have been discharged in a warehouse, he issued a decree of condemnation.

Sec. 151. The Same. The "Achaia No. 2." The case of the *Achaia No. 2,*[1] decided by the Prize Court for Egypt, was distinguished from the *Roumanian* in that the goods on the ship (a German vessel) were *neutral* property (Turkish) at the time they were discharged and stored in a customs warehouse at Alexandria. But in consequence of the outbreak of war between Great Britain and Turkey they were enemy goods at the time they were seized as prize. The claimants did not contest the jurisdiction of the Prize Court on the ground that the seizure was made on land, as was done in the case of the *Roumanian* —that question had already been settled by the decision of the Privy Council in the latter case—but they denied the liability of the goods to capture for the reason that at the time they were landed they were the property of neutrals and that as soon as they were landed they passed into the possession of their neutral owners and the Prize Court therefore had no further rights or control over them. Judge Grain, however, condemned the goods on the broad principle laid down by Sir Samuel Evans in the case of the *Roumanian* that all enemy property may be captured, after the outbreak of war, on the sea or in the rivers, ports, or harbors of Great Britain. The fact that the goods were neutral at the moment of arrival and did not become enemy property until a subsequent date did not alter their situation. In fact they had been in the custody of the port officer since the seizure of the ship. If they had been allowed to remain on the confiscated ship, no one would contend, he said, that they would have been immune from capture after the outbreak of war between Great Britain and Turkey. On the authority of the *Roumanian* he thought the goods, although landed, were still a part of the cargo of an enemy ship and being still within the jurisdiction of the Prize Court and having become enemy property, were confiscable.

Sec. 152. The Same. Case of "Ten Bales of Silk at Port Said." Differing only slightly from the case of the *Achaia* but materially from that of the *Roumanian* was the case of *Ten*

[1] I, Br. & Col. Pr. Cas., 636.

[illegible] of [illegible] which involved the liability to restitution [illegible] which had been shipped on a through bill of lading to a French consignee, which had been discharged from a German vessel the Lord Clyde at Port Said for transhipment before the outbreak of war with either France or Germany and which were seized after the outbreak of war while they remained stored in a warehouse at Port Said. The claimants contended that they were goods "on land" and therefore the Prize Court had no jurisdiction to condemn them. They argued further that the fact that they were "in port" at the time of seizure did not give the Prize Court jurisdiction, since they were only put under an "embargo locally" by reason, i.e. as enemy goods such as was the case with the oil on the Kronprinsessan Margareta. The Prize Court and the Privy Council, they asserted, had power to condemn in the latter case on the "technical locality" of the cargo of the Kronprinsessan Margareta, before the vessel in port, in the present case there was no such locality.

Lord Parker, however, held that the goods having been shipped under a through bill of lading, entitling the consignee of cargo in transit while placed in the warehouse and were therefore a proper subject of maritime capture and could be condemned as enemy property. The question of the liability to restitution captured enemy property seized while in port had, he said, already been settled once for all in the case of the Kronprinsessan. His actual words were that there was a "practice of Prize" between the cases and that was to the effect that the goods in the Kronprinsessan were liable to seizure while the merchant ships, whereas those on the Lord Clyde were not, because at the time they belonged to a neutral "Transitaire." He said, "I see no reason in the circumstances that such practice should not be a proper subject for prize." In considering the rules and principles upon the principles which determine whether goods are capable of being made prize or not, it has been found necessary to use the phrase enemy character in two senses, whether the goods are referable to any particular ship, or whether they retain the property clothed with a hostile character, but whether, when the Crown lays its hands upon them they are liable to be taken as prize.

Regarding the distinction between cargo which remains a bona

[1] [illegible] The only difference between the Kronprinsessan Margareta case and the present case was that in the former the goods had been taken off the ship in the port of destination, but for which they would have been liable to be seized prize, in the present case they were condemned at Port Said at the earliest moment of hostilities before the outbreak of war for technical reasons to prevent them from being transhipped.

tile character while still afloat and that which is already ashore when its owner becomes an enemy—a distinction which he thought did not affect its liability to capture—he said:

"I am of opinion that all the trouble has arisen out of the use of an unfortunate nomenclature. The phrase 'on land' has become a term of art in prize law, and is, I believe, equivalent to the words 'not cargo,' and nothing else. If instead of saying that goods were released because they had been seized on land we were to give as the true reason that they were not cargo, I believe we should go far to harmonize the cases. By employing the words 'on land' sometimes as a term of art, and sometimes in their literal significance, we only confuse ourselves, and end in a vicious circle."

Judge Grain in a concurring opinion agreed with Judge Cator that the transshipment of the goods at Port Said did not interrupt the continuity of the voyage and consequently they retained their maritime character while remaining in a warehouse on land. He even went further than Judge Cator and expressed the opinion that the goods were liable to maritime capture by the mere fact that they were enemy goods in port at the outbreak of war.

Sec. 153. Goods Landed by Neutral Ship and Placed in Bonded Warehouse. In the case of the *Dandolo* and the *Caboto*[1] two neutral ships having brought into the port of Colombo certain non-contraband enemy goods the latter were transshipped into lighters, landed and placed in a bonded warehouse in the port where they were subsequently seized as prize. It was argued *inter alia* before the Ceylon Court of Admiralty, sitting in prize, that the goods not having been seized afloat could not be condemned as prize. Acting Chief Justice Shaw, however, held on the authority of the *Roumanian* and the *Eden Hall*, that the goods were not immune from capture merely because they had been landed and placed in the customs warehouse in the port. The case differed from the *Roumanian* in that the goods had been brought in on neutral rather than British ships. In the latter case the goods were at all times liable to capture during the voyage and it was on that ground that the Privy Council

[1] II, Br. & Col. Pr. Cas., 339. Other cases involving the seizure as maritime prize of goods landed from neutral vessels in English ports were the *Bergenhus* (VII, Lloyd, 111); the *Batavier, II*, and the *Batavier, VI* (VI, Lloyd, 392)—in this latter case they were landed before the outbreak of war; the *Bawean* (VII, Lloyd, 113) where it was held that enemy goods, when shipped, retain their enemy character until they reach their destination and transshipment from an enemy into a neutral vessel with the destination changed does not operate to defeat the rights of a belligerent; and the *Mincio* (South Afr. Prize Court Decisions, 67), goods landed at Cape Town from an Italian vessel.

actually decided the case, although the Privy Council made it clear that the Prize Court had jurisdiction to condemn goods in a warehouse in port. In the present case the claimants contended that the goods being brought in under a neutral flag were by the terms of the Declaration of Paris exempt from capture. On this point, however, the Court held that the protection of the neutral flag only extends to goods which are actually under that flag at the time of capture and not to goods which have been freely parted with by neutral ships (as was the case here), and which were subsequently seized either afloat or ashore.[1]

Sec. 154. French Jurisprudence. Seizures on Docks and in Warehouses. The jurisprudence of the British Prize Courts regarding the liability to capture as maritime prize of goods seized in port or ashore in port was followed by the French and Italian Prize Commissions. In the case of the *Kirkoswald No. 2* [2] the French Prize Commission took jurisdiction and declared valid the capture on the docks at Marseilles of a quantity of mineral oil taken from an English vessel upon which it had been shipped at New York to the order of the Swiss *Société de Surveillance Economique*. Similarly, the seizure in the customs warehouse at Cette of certain enemy goods, having the same destination, was held to be valid.[3] In all such cases the goods seized were contraband of war and had been discharged either from British or neutral vessels. But the French Prize Commission, unlike the British Prize Courts in certain of the cases mentioned above, did not apply the rule of maritime law and condemn enemy goods of a non-contraband character landed from *neutral* vessels and seized on shore. Thus in the case of the *Almazora*,[4] decided March 4, 1920, the Prize Commission held that certain parcels of hosiery belonging to the enemy, which had been landed from a Spanish vessel and seized on the quay at Cette and which were not on the French list of contraband, continued to enjoy the protection of the neutral flag under which they had been transported; that is, they were held to have been protected by the Declaration of Paris, that "the neutral flag covers enemy merchandise, contraband of war excepted." In short, the theory according to which a quay upon which enemy goods are landed is regarded as a prolongation of the ship transporting them does

[1] See further as to this case, Sec. 243, *infra*.
[2] Fauchille, *Jurispr. Franc.*, 441.
[3] The *Nuevo Ampurdanas*, *ibid.*, 481; and the *Pena Castillo*, 27 *Rev. Gén.* (1920), *Jurispr.*, 79.
[4] 27 *Rev. Gén.* (1920), *Jurispr.*, 72. See also Sec. 244, *supra*.

not apply when the ship is a neutral vessel; in that case the goods must be regarded as being still under the protection of the neutral flag.[1] This was contrary to the interpretation of the British Prize Courts in the *Dandolo* and *Caboto*, the *Bergenhus*, the *Bawean* and other cases where non-contraband enemy goods landed from neutral vessels and seized as maritime prize were denied the protection of the Declaration of Paris.

Sec. 155. Italian Jurisprudence. Seizures in Warehouses and on Dry Land. In the case of the *Ambra*[2] the Italian Prize Commission took jurisdiction in accordance with Article 7 of the decree of May 30, 1915, of certain goods laden on an Austro-Hungarian vessel which had taken refuge in the Italian port of Massana, which goods had been sequestrated upon the outbreak of war between Italy and Austria-Hungary. The goods had been landed and stored in a warehouse where they were subsequently seized as maritime prize. They were, however, released on the ground that they were neutral property.

In the case of the *Beleno*[3] the Italian Prize Commission condemned an Austro-Hungarian vessel which had been captured not at sea or in interior waters but on "dry land" where it had been hauled up by its owner apparently to avoid capture. The rules relative to the exercise of the right of capture,[4] the commission observed, undoubtedly speak in Article 5 in a general fashion, of captures made at sea or in interior waters. But these general expressions cannot be understood in a restricted sense and as an imperative prescription. If it were otherwise, it would result that capture could be avoided by withdrawing ships into a basin or hauling them upon a quay. "The right to capture private property," said the Commission, "a right absolutely recognized to belligerent states in the supreme interest of war would depend, in great part, upon the caprice and artifice of the interested parties or upon simple local accidents and would create a crying contrast between ships anchored in the waters of a port

[1] Nevertheless, the goods in this case were condemned under the reprisals decree of March 13, 1915, which provided for the seizure of all goods belonging to subjects of the German Empire going to or coming from Germany. In the case of the *Margueritte*, decided July 3, 1920 (*ibid.*, 96), the prize commission held that the immunity mentioned in the *Almazora* case applied only when the goods were actually transported under a *neutral* flag and not when transported under a *French* flag. See also Sec. 241, *infra*.

[2] Fauchille et Basdevant, *Jurispr. Ital.*, 73.

[3] *Ibid.*, p. 229. Compare also the case of the *Monfalcone* (*ibid.*, 498), an Austrian vessel seized while in dry dock at Grado; and the *Iola* (*ibid.*, 200), where the seizure was made on a non-navigable river.

[4] *Règles Relatives à l'exercise du Droit de Prise pendant la guerre Actuelle* (Mar. 25, 1917), text, *ibid.*, *Annexe*, pp. xlv ff.

and those which happen to be on land; the first alone would be subject to capture and confiscation; the fate of the second would depend entirely upon the discretion of their owners."

Roumanian legislation, on the contrary, impliedly excludes the idea of maritime captures made on land. The prize regulations of 1917 permit captures to be made only in the open sea or in territorial waters. They expressly exempt from capture goods which although found on board ship are there simply *en depôt*. Consequently, while English jurisprudence extends the right of maritime capture to goods seized on land adjacent to the sea, the law of Roumania extends the principle of non-confiscability of property on land, to goods deposited on a floating body but without having the character of cargo.[1]

Sec. 156. Seizures on Land in the Interior. The question as to whether the law of maritime capture extends to seizures made by the military forces in the interior of the enemy country was presented to the British Prize Court in the interesting case of the *Anichab and other Vessels and Craft*.[2] Briefly stated, the facts were these: when the British South African forces occupied Luderitz Bay and Swakopmund, in German Southwest Africa, in September, 1914, and January, 1915, respectively, a number of tugs, lighters, and other craft and material belonging to a German steamship company were seized. Some of the craft were afloat but others had been beached, some above and some below high water mark. Other lighters and craft had been forwarded by rail, apparently to avoid capture, to two different places situated 147 and 309 miles inland, respectively. Some months later when these places were captured by the British military forces the craft were seized.[3]

The claimants contended, in the first place, that the craft came within the category of small boats engaged in local trade and were therefore exempt from capture under Article 3 of the XI Hague Convention; second, that even if they did not belong to this category they were not the subject of maritime prize for the reason that they were not captured by the naval forces alone or by the naval forces acting jointly with the military forces, in the sense of the Naval Prize Act. Nor was it a case of "hot pursuit" of maritime property run ashore to avoid capture, since several months had elapsed between the removal of the craft to the interior and their subsequent capture. Finally, they argued that

[1] Verzijl, *op. cit.*, p. 270.
[2] IX, Lloyd, 119; III, Br. & Col. Pr. Cas., 611.
[3] As to this case see also Sec. 52, *supra*.

assuming that the craft belonged to the category of "war material" in the sense of Article 53 of the IV Hague Convention it was private property and under the terms of that convention it must, when seized, be restored with indemnity.

Lord Sterndale admitted that it was a "curious case" and raised questions which had never come before him. As to the tugs and other craft seized "at or about" Luderitz Bay and Swakopmund, he said he had no doubt that they were the subject of maritime prize. They were craft which were intended for navigation either coastwise or on the high seas and it did not matter whether they were in the water or on the beach at the time they were seized and that it was equally immaterial whether they were taken possession of by a naval commander or some one else acting under the authority of the Crown.[1] They were as much liable to capture as enemy goods stored in warehouses on land—a liability which had been settled by the case of the *Roumanian.* Nor did they belong to the category of small vessels engaged in local trade, since they had been employed for facilitating the operation of trans-oceanic liners. They were therefore good and lawful prize and must be condemned.

As to the craft that had been removed to the interior and captured by the military forces they must be treated as seizures on land and were not therefore a subject of maritime prize. He thought Lord Parker was correct in saying, as he did in the case of the *Roumanian,* that if property is liable to seizure at sea, and the enemy succeeds in getting ashore and runs away with it, the opposing belligerent has a right to pursue him and capture it. But this could not be considered as a case of "hot pursuit," since the capture took place six months after its removal to the interior. It was a case of seizure on land by the military forces exclusively and was therefore not the subject of maritime prize, but that inasmuch as indemnities, if any, were under the IV Hague Convention to be settled upon the conclusion of peace the craft must be released without indemnity damages or costs.

Lord Sterndale's judgment was affirmed by the Judicial Committee of the Privy Council.[2]

Sec. 157. Captures on Inland Lakes. The liability to capture as maritime prize of property on inland waters was brought

[1] Compare in this connection, the case of *Three Motor Gunboats* (VII, Lloyd, 106) in which Sir Samuel Evans condemned as maritime prize three motor gunboats constructed for the Turkish government and which were seized by the British admiralty at Southampton while they were still on the slips.

[2] IX, Lloyd, 132; III Br. & Col. Pr. Cas., 993.

before the British Prize Court in the case of *Craft Captured on Lake Victoria Nyanza.*[1] Certain German craft and other property having been captured by British warships on the waters of Victoria Nyanza in East Africa, Lord Sterndale held that they were proper subjects of maritime prize and he condemned them. The lake on which the captures took place was, he said, an inland body of water and it was inaccessible to vessels from the sea and the vessels which plied upon it were either built there or brought overland, either whole or in sections. But it was a very large lake, being second only in size to Lake Superior among the fresh water lakes of the world. Its area exceeds 26,000 square miles, its greatest length being about 250 miles and its greatest width about 200 miles. Steamers of fair size navigated it and they carried on considerable trade. Situated partly in British and partly in German East Africa both powers maintained armed vessels upon it.

Lord Sterndale admitted that there was no authority for condemning as maritime prize craft captured on such a body of water, except the case of the *Kiangani* and the *Hedwig von Wissmann*[2] where Sir Samuel Evans had awarded prize bounty to the crews of certain British armoured motor launches for having captured those vessels on Lake Tanganyika. This lake was considerably smaller than Victoria Nyanza but in other respects the situation was no different. Reference was also made to the judgments in the *Roumanian* and the *Miramichi* where it had been laid down that *prima facie* all enemy property is liable to seizure and condemnation as prize, and to *Lindo v. Rodney,* where Lord Mansfield and the Court of King's Bench had declared that the right of prize was not limited to the taking of property at sea. Reference was also made to the Italian case of the *Cervignano et Friuli*[3] where two enemy vessels captured on an Austrian river had been condemned as maritime prize, and to the German case of the *Primula,*[4] where a Russian ship seized on the river Trave had been similarly condemned. Lord Sterndale also thought the American case of the *Cotton Plant*[5] was author-

[1] VIII, Lloyd, 158; III, Br. & Col. Pr. Cas., 295.
[2] VI, Lloyd, 108.
[3] Fauchille et Basdevant, *Jurispr. Ital.*, 178.
[4] I Entsch., 17; Fauchille et De Visscher, *Jurispr. All.*, 14.
[5] 10 Wall 581. The United States Supreme Court in this case held the capture to be illegal because it was contrary to a statute which provided that no property seized on the inland waters of the United States by the naval forces thereof should be regarded as maritime prize. It was agreed that the statute was applicable only to such bodies of water as the Great Lakes. Lord Sterndale thought that the decision was an expression of

ity for the view that a ship captured on the Roanoke River 130 miles from its mouth was a subject of maritime prize, although it had been cited in some text books as authority for the contrary proposition.

On the basis of these authorities and taking into consideration the character of Lake Victoria Nyanza, Lord Sterndale held that the captures made thereon were lawful and that the craft must be condemned as maritime prize.

In the case of the *Myrza Blumberg,*[1] the Italian Prize Commission upheld the legality of the capture of a German steamer on Lake Proklyan which connects with the maritime enemy port of Sebenico (Dalmatia).

III

Captures in Neutral Waters

Sec. 158. The Principle of International Law. Both custom and convention (Art. 2, XIII Hague Convention of 1907) forbid captures, acts of hostility and the exercise of the right of search in neutral waters. This prohibition is expressly embodied in the prize regulations of most states. Regarding the extent of the territorial sea in which such acts are forbidden the prize tribunals of Germany and France were not entirely in accord, the former holding strictly to the traditional three mile rule, the latter showing a disposition to recognize exceptions due to the special situation of particular states.

Sec. 159. Cases of the "Elida" and Others. The German View. In the case of the *Elida,*[2] the German Supreme Prize Court held that even supposing that international law recognized the right of states to fix at more than three marine miles the extent of their territorial waters as a means of protecting their neutrality, a German Prize Court could not declare illegal the capture of a ship made beyond the three mile limit of a neutral state

opinon that but for this statute a seizure on the Roanoke River would have been a lawful seizure. Lord Sterndale added that in his opinion what Chief Justice Taney said in the case of the *Propeller Genesee Chief* v. *Fitzhugh,* that the Great Lakes of America were "in truth inland seas" upon which hostile fleets had encountered one another and where prizes had been made, could be said equally of such bodies of water as Lake Victoria Nyanza. There was in fact a "complete analogy" between the Great American Lakes and Victoria Nyanza.

[1] Fauchille et Basdevant, *Jurispr. Ital.,* 393.

[2] 1 *Entsch.,* 9; Fauchille et De Visscher, *Jurispr. All.,* 8; English Translation in 10 *Amer. Jour.,* 916.

but within a zone of four miles fixed by such state, considering that the German prize code (Art. 3a)[1] prohibited captures only in a zone of three miles off neutral coasts. The capture of the *Elida* took place off the coast of Sweden whose government had proclaimed a four mile territorial zone, as that of Norway had similarly done. The Swedish ordinance, said the Prize Court, had been recognized only by the government of Norway but not by Germany or by Great Britain. German Prize Courts in such cases, it was added, were bound by their own national law and not by the rules of international law, even assuming that the Swedish ordinance was in accord with international law. In fact, the principle of the German prize code, which was based on the three mile rule, was not, it was added, contrary to international law. If it were admitted that each state could fix in its discretion the extent of its territorial waters it would lead to intolerable conditions. The three mile limit was formerly generally recognized both in theory and practice, being based on the range of cannon at the time the rule was formulated. It was true that the reason which led to the adoption of the rule no longer corresponded with the facts.

"But the occasion existed for applying the principle *cessante ratione, non cessat lex ipsa,* and if so numerous be the diverse propositions and opinions which have been emitted in favor of other modes of delimitation of territorial waters, one cannot pretend that any one of these modes has received the unanimous assent of maritime States in practice. Considering the range of modern artillery, the admission of the right of each State to define the limits of its territorial waters would be to permit them to bring under their sovereignty vast areas of the high seas whose freedom is required by the common interest of all maritime nations. If the right of particular States to extend the three-mile rule for customs or sanitary purposes be recognized it does not follow that the rule may be extended for any and all purposes."

The Court then cited various recent international acts which recognized the three mile rule as being a principle of international law and it called attention to an official notification addressed during the late war to the government of Uruguay in which the British government declared that it would not recognize the claim of Uruguay and Argentina to extend their territorial waters beyond three miles. Finally, the fact that some states had not formally raised objections to the principle of the Swedish ordinance constituted no reason why Germany should feel obliged to acquiesce in it. The German Prize Court reached the same con-

[1] Text in Huberich and King, *The German Prize Code*, p. 3.

clusion in the cases of the *Gefion*[1] and the *Dux*,[2] both of which involved the same question.

Sec. 160. French Jurisprudence. The French prize regulations,[3] on the contrary, charge the officers of the marine, in applying the XIII Hague Convention to respect the regulations and neutrality declarations of particular states which fix the limit of their territorial waters at a distance in excess of three miles. From an annex to the French prize regulations it appears that Denmark, Norway, and Sweden had fixed the limit at four miles; and Italy and Russia at the range of cannon shot. Apparently also Argentina, Uruguay, and some other states have extended the limit of their territorial waters beyond three miles.

In the case of the *Heina*,[4] the French Prize Council, in accordance with these instructions, upheld the validity of the capture of a Norwegian vessel made at a point four and five-sixths miles from an island off the coast of Denmark, Denmark having fixed the limit of its territorial waters at four miles. But if the capture had been made at a distance from the coast not exceeding four miles but beyond the limit of three miles, the Prize Council indicated that it would have respected the Danish rule and declared the capture invalid.

Sec. 161. Point from Which Three Mile Zone Is Measured. The British Prize Courts like those of Germany accepted the three mile rule, not however, because they were bound by any municipal prize regulations as were the Prize Courts of Germany, but because they regarded it as being in accord with the generally established practice, if it was not a universally admitted rule of international law.[5] In the case of the *Düsseldorf*[6] the British Prize Court was called upon to consider the question from what point on the Norwegian coast the three mile zone should be measured. In this case the Crown asked for the condemnation of a German vessel and her cargo which had been captured at a point a little less than three miles from certain small pieces of land separated from the mainland by a narrow passage of water which dries up at low tide. A claim was put

[1] I, *Entsch.*, 21; Fauchille et De Visscher, *Jurispr. All.*, 16.
[2] *Ibid.*, 70; *ibid.*, 59.
[3] Arts. 22 and 23, *Instructions sur l'Application du Droit International en Cas de Guerre, etc.*, 1912, *revised* 1916.
[4] Fauchille, *Jurispr. Franc.*, 119.
[5] See notably the cases of the *Bangor*, the *Valeria* and the *Pellworm* discussed below.
[6] IX, Lloyd, 1, 12; III, Br. & Col. Pr. Cas., 466, 664.

forward by the Norwegian government for restitution, damages and costs, on the ground that the seizure was made within the territorial waters of the Kingdom, by which it meant within three miles of Norwegian land whatever that might be. It claimed that its territorial waters extended to a distance of four miles but, without abandoning the principle, it did not press the claim in this case, since it was not necessary. The Prize Court, adverting to the Norwegian contention which was, in effect, that wherever there was a rock, however small and whether it was inhabitable or uninhabitable, situated within three miles from the mainland it must be regarded as a part of the territory of Norway and that the territorial sea must be measured from such a rock, observed that this was "a very extreme contention." Sir Samuel Evans concluded: "but I cannot see my way clear to say that two pieces of land which are not disconnected from the mainland at low water, and not separated in any way, are not part of the mainland." "If that be so, then, taking the position given by the Crown, this capture . . . took place within three miles of the Norwegian coast so defined . . . and therefore there must be an order for the release of the ship and cargo." Sir Samuel admitted that it was very difficult to judge in regard to a coast like that of Norway where the three mile limit does begin."[1]

Sec. 162. Legal Effect of Captures in Neutral Waters. What is the legal effect of a capture made within the recognized territorial waters of a neutral power? Here as elsewhere there is a divergence of judicial opinion and practice. The prize tribunals and sometimes the prize regulations of states (for example, Germany and France) treat such captures as absolutely illegal irrespective of whether the neutral power in whose waters the capture was made, intervenes or not; others, notably those of Great Britain and the United States, consider them as being invalid not as regards the opposing belligerent, but only as against the neutral whose territorial sovereignty has been violated and then

[1] Compare also the case of the *Loekken* (IX, Lloyd, 17, note), a Norwegian ship captured in the vicinity of the Naze (or Lindesnes). The Norwegian government claimed its release on the ground that the capture had taken place in Norwegian waters. While maintaining a more extensive zone than three miles, the Norwegian government was willing to accept, for the purpose of this case, the three-mile limit but contended that as the ship was captured near a bay of enclosed waters, the limit was to be measured from a line marking the seaward edge of the bay. Sir Samuel Evans said it had never been decided as a matter of law how the boundaries of a bay are to be fixed. He condemned the ship on the ground that the capture had not taken place within the three-mile limit; the Norwegian government appealed the case to the Judicial Committee which dismissed the appeal.

only when it has protested and demanded restitution of the ship and the payment of damages. Article 3 of the German prize code, after enumerating the places where the right of capture cannot be exercised, among which are neutral territorial waters, declares that a vessel captured in violation thereof "is to be released immediately, more particularly at the request of the neutral state."

Sec. 163. German Jurisprudence. Prize Court No Jurisdiction of Captures in Neutral Waters. In the case of the *Ambiorix*,[1] the German Supreme Prize Court overruled the Prize Court of Kiel which had condemned a Belgian ship captured near one of the islands of Sweden, which the captain claimed was within the territorial waters of the country. The supreme court affirmed that the capture of a ship could not be pronounced legal by a German Prize Court unless it was convinced that the seizure had taken place outside the territorial waters of a neutral state and that a capture made in neutral waters gave the captor no rights whatever. It belonged to the Prize Court as of right to determine in each particular case the place where the capture was made and if the question could not be resolved affirmatively the validity of the capture could not be upheld.[2] It was incumbent upon the imperial procurator to prove that the capture had not taken place in neutral waters, and in this case he had failed to do so.

Sec. 164. French Jurisprudence. The French Prize Council was evidently of the same opinion regarding the illegality of captures made in neutral waters and, following the German doctrine, it proceeded on the principle that the intervention of the neutral power was not necessary.[3] But it held that where the seizure took place in the territorial waters (in this case the territorial waters of Greece) of a neutral power where there had been a succession of hostile acts by the armed forces and the *authorities* of the enemy, the effect of which had been to transform those waters into a theater of war and thereby deprive them of the benefit of neutrality, the owners could not challenge the validity of the capture on the ground that it had taken place in neutral waters.[4] This view was, said the Prize Council, in

[1] I. *Entsch.*, 170; Fauchille et De Visscher. *Jurispr. All.*, 131.

[2] But compare the cases of the *Ynez* and the *Guldborg* (I. *Entsch.*, 265, 280), where it was contended by the claimants to the two that they had been captured in neutral waters but in which the prize court held that they had not established their contention and therefore the captures were held to have taken place outside territorial waters.

[3] The *Heina*, Fauchille, *Jurispr. Franc.*, 119.

[4] The *Tinos* and others, *ibid.*, 390.

conformity with the jurisprudence of nations as applied in former wars.[1] This decision was attacked but upheld by the Council of State in the cases of certain Austro-Hungarian vessels captured by the French forces in the territorial waters of Greece, at the time theoretically neutral, but not so in reality.[2] The appellants contended that the acts of hostility alleged to have been committed by Germany and her allies in Greek territory and which according to the decision of the Prize Council in the preceding case had transformed the territorial waters of Greece into a theater of war, were individual acts and not those of the military or civil functionaries of the Central Powers; that other acts such as those which tended to make Greek waters a base of supplies for enemy submarines were committed by the Germans alone and that Greeks did not participate in these acts; that the commission of hostile acts in certain waters of Greece did not operate to transform other distant waters, in which the Austrian ships had been captured, into a theater of war; and finally, whatever the nature of the acts relied upon by the Prize Council as a justification for the condemnation of the German ships, the seizure of the Austrian vessels in a closed harbor within the limits of the public domain of Greece constituted a new violation of international law.

But the Council of State rejected these contentions and declared that Germany and her allies had repeatedly used Greek waters as bases of revictualment and of naval operations against allied ships; that Article 5 of the XIII Hague Convention in expressly forbidding the establishment of naval bases of operation in the territorial waters of neutral states intended that such acts should be regarded as a violation of neutrality; and that the organization of bases of revictualment under the direction and control of official agents of the Central Powers did not constitute acts of contraband traffic by individuals but veritable acts of hostility by the state in violation of the neutrality of Greece. Such acts, it was added, had been done on all the coasts of Greece which enclosed the harbor in which the Austrian ships had been seized and thereby converted Greek territorial waters generally into a theater of war. Consequently, the claimants could not invoke the benefit of Art. 2 of the same Hague Convention

[1] The decisions of the Japanese Prize Court in the cases of the *Ekaterinoslav* and the *Mukden* (Hurst and Bray, Japanese Prize Cases, pp. 4, 7, 14, and 16) were cited.

[2] The *Korana*, *Marienbad*, *Sabbadino* and *Salona*, 27 *Rev. Gén.* (1920), *Jurispr.*, 10.

which forbids captures in the territorial waters of a neutral power.[1]

Sec. 165. Italian Jurisprudence. The Italian Prize Commission also apparently followed the German and French doctrines that captures made in waters which were really neutral were illegal. In the case of the *Atlanta* or *Stella Polare*,[2] it declared that it was not permissible to exercise the right of capture in neutral waters so long as the ship was in such waters, but it held that the momentary *séjour* of an enemy vessel in neutral waters (apparently prior to its capture) did not alter its enemy character but constituted an accidental circumstance, the effects of which ceased with the circumstance. Therefore the capture of an Austro-Hungarian ship which had been sold to an Italian company after the outbreak of war while it was in the neutral port of Buenos Aires was declared to be legal.

Sec. 166. British Decisions. Validity of Captures in Neutral Waters. The British Prize Courts, contrary to those of Germany, France and Italy considered captures made in neutral waters to be illegal only as against the neutral power; *vis à vis* the enemy owners, the captures were recognized as legal, at least the Prize Court had no jurisdiction to release them for that reason, upon demand of the enemy government. Thus in the case of the *Achaia*,[3] Lord Parker, speaking for the Judicial Committee of the Privy Council, and adverting to the question whether Egyptian ports should be treated as enemy ports within the meaning of the Sixth Hague Convention, said: "Even if Alexandria could be regarded as a neutral port, the fact would be immaterial. The seizure of an enemy vessel in a neutral port, though a breach of neutrality, would not in a court of prize afford any ground for its release." Shortly afterwards Sir Samuel Evans had occasion to discuss the matter with more detail in the case of the *Bangor*,[4] which involved the legality of the capture of a neutral vessel in the territorial waters of Chile, while the vessel was engaged in supplying coal to a German warship. Neither the German government nor the Norwegian owner could, he said, challenge the validity of the capture, by demanding resti-

[1] Compare also the Russian Case of the *Mendl* (Jan. 28, 1916) where the Prize Court at Sebastopol condemned a vessel captured on the neutralized part of the Danube, for the reason that it was not really neutralized because of the Austrian bombardment of Russian vessels on the river.

[2] Fauchille et Basdevant, *Jurispr. Ital.*, 436. To the same effect see also the case of the *Eugenia* or *Lombardia*, *ibid.*, p. 471.

[3] V, Lloyd, 66; II, Br. & Col. Pr. Cas., 46.

[4] V, *ibid.*, 308; II, *ibid.*, 206.

tution on the sole ground that the capture had taken place in neutral waters; only the neutral state whose sovereignty had been violated by the act could do that. "No proposition in international law," he said, "is clearer or more surely established, than that a capture made within the territorial waters of a neutral is, as between enemy belligerents, for all purposes rightful; and that it is only by the neutral state concerned that the legal validity of the capture can be questioned. It can only be declared void as to the neutral state and not as to the enemy." Various decisions of the United States Supreme Court were cited in support of this view, among others the *Anne*,[1] from Judge Story's opinion in which the above quotation is largely a reproduction, and the *Sir William Peel*,[2] in which the Supreme Court said: "Neither an enemy, nor a neutral acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters." The contention of counsel that this "well established rule of international law" had been modified by the Thirteenth Hague Convention, Sir Samuel thought was not justified, since it was clear that this Convention was directed to the relations between neutral powers and belligerent powers and was only intended to apply to questions arising between neutral powers and belligerent powers as such. Its provisions did not therefore affect the rule relating to capture in territorial waters of a neutral state as between two belligerent powers, where the neutral state did not intervene.

Sec. 167. Right of Neutral to Costs, Expenses, and Damages. In the case of the *Düsseldorf*[3] involving the legality of the capture, through miscalculation of the distance, by a British warship, in the territorial waters of Norway, the Prize Court held that the ship must be released upon the demand of the Norwegian government, and the Privy Council,[4] upon appeal, held that the Norwegian government was entitled to be reimbursed for costs and expenses incurred in taking delivery of the ship and removing it from England to Norway, though not for damages on account of the unlawful capture in Norwegian waters, apparently, because the violation of Norwegian neutrality was the result of error. It will be noted that this case differed from that of the *Bangor* in that the neutral government here intervened and demanded costs, expenses, and damages, whereas in the case of the *Bangor* the neutral government neither protested

[1] 3 Wheaton, 435. [2] 5 Wallace, 517.
[3] IX, Lloyd, 1; III, Br. & Col. Pr. Cas. 466.
[4] IX, *ibid.*, 12; III, *ibid.*, 664.

nor demanded reparation. While holding in the case of the *Düsseldorf* that the capture was unlawful as against the neutral in whose waters it had taken place and that in consequence the neutral government was entitled to reimbursement for expenses and doubtless would have been accorded damages had not the violation of its neutrality been due to error, the Judicial Committee affirmed that as against Germany the capture was good, the "claim of territory" as it is called being one which is available to the territorial sovereign only and not to the private shipowner. In short, the question of the seizure was one between Great Britain and Norway alone and it was a diplomatic question over which the Prize Court had no jurisdiction, since a Prize Court is not a disciplinary tribunal for naval officers, charged with the correction of errors committed by them. Lord Sumner, speaking for the Judicial Committee, said: "No one would wish to make light of a violation of territorial sovereignty, but in itself this is a matter arising between sovereigns and, apart from the peculiar position of captors who are bound to bring their alleged prize before the Court, it would in itself be non-justiciable, for in effect the Prize Court would be called on to pronounce a decree, founded on the conduct of his officers, against the sovereign in virtue of whose commission it is authorized to act, and to evaluate imponderable wrongs, which lie outside the category of those with which it is wont to deal." [1]

Other similar British cases were the *Valeria*,[2] a German ship captured in the territorial waters of Norway, and which involved a Norwegian claim for restitution; and the *Pellworm and other vessels*,[3] which involved a Dutch claim for restitution and damages for the seizure by a British cruiser of three German ships in the territorial waters of the Netherlands.[4]

Sec. 168. Capture of Vessel Outside Neutral Waters by Warship Within Said Waters. Suppose a ship is captured on the high seas by a war vessel which is itself in neutral waters. Does the prohibition against captures in neutral waters apply to such a case? In the case of the *Tello*,[5] the German Supreme Prize Court observed that "it is true that the right of capture cannot be exercised in neutral territory. It may be true also

[1] See further on this point, Secs. 50-51, *supra*., and 484, *infra*.
[2] IX, Lloyd, 23, 41 (appeal); III, Br. & Col. Pr. Cas., 664, 834 (appeal).
[3] IX, *ibid*., 147, 170 (appeal); III, *ibid*., 702, 1053 (appeal).
[4] See also the curious case of the *Den of Glamis* (So. African Decs., 9), involving the seizure of certain enemy cargo on board an English vessel by the captain of the latter while in the neutral Portuguese port of Beira.
[5] I, *Entsch*., 161; Fauchille et De Visscher, *Jurispru. All*., 127.

that a ship of war, finding itself in the territorial waters of a neutral state has not the right to proceed to exercise the right of capture against a ship navigating the high seas." The French Prize Council also appears to have considered that a capture in such cases was not lawful, although it upheld the legality of a capture made by a French cruiser outside the three mile zone but which while directing itself toward the suspected ship passed through the neutral zone.[1]

Sec. 169. Capture Within Neutral Waters by Ships Outside Thereof. The English case of the *Pellworm and other vessels* [2] afforded an instance in which an English cruiser while outside the three mile limit captured a vessel which at the time was within Dutch territorial waters. It appears that when the cruiser approached the German vessel outside the three mile zone the latter hauled down its flag but continued to drift with the aid of the tide, apparently with the intention of escaping, until it was within the territorial waters of the Netherlands where it was actually boarded and seized. The Judicial Committee held that although the capture took place in the neutral waters of the Netherlands, there was no intention on the part of the commander to violate Dutch neutrality since he honestly believed that the ship was outside the neutral zone. His conduct was not therefore blamable and the Dutch government was not entitled to demand damages therefor.

The prize regulations of Roumania alone appear to deal specifically with cases of this kind. Article 25 of these regulations declares that no capture can be made within the territorial waters of a neutral state, either directly when the warship finds itself in the waters of a neutral state or *vice versa*.[3]

Sec. 170. Effect of Traversing Neutral Zone with Prize. On the other hand, a capture made on the high seas is not invalid by reason of the fact that at the moment the captured ship has temporarily left a neutral port,[4] nor because while being taken in to a home port for adjudication it traverses the territorial waters of the neutral power whose nationality the vessel

[1] The *Heina*, Fauchille, *Jurispr. Franc.*, 409.
[2] IX, Lloyd, 147, 170 (appeal); III, Br. & Col. Pr. Cas., 702, 1053 (appeal). See also Secs. 76 and 485.
[3] Quoted by Verzijl, *op. cit.*, p. 279.
[4] The *Frode* (German case); II, *Entsch.*, 324. Compare also the discussion between the British and Argentine governments relative to the *President Mitre* where the Argentine government maintained that the departure from time to time of German ships from Argentine ports in the prosecution of the coasting trade did not operate to deprive such ships of their character as coastwise vessels and therefore render them liable to capture by the English while on the high seas. Referred to by Verzijl, *op. cit.*, p. 280.

possesses. This latter point was decided by the German Supreme Prize Court in the cases of the *Thorsten* [1] and the *Reserv*.[2] Both were Swedish vessels which had been captured by the Germans and while being conducted to a German port passed through the territorial waters of Sweden and the *Reserv* actually weighed anchor during the night in the harbor of Malmö. The claimants contended before the Prize Court that this *traversée* of neutral waters, and especially the weighing of anchor in the port of Malmö, was equivalent to entering a neutral port, the effect of which was to render the prizes free *ipso jure*. In the case of the *Reserv* they relied upon the deliberations of the Second Hague Conference and an opinion of Professor Niemeyer in support of their view. The Prize Court however reached a contrary conclusion and held that the passage of the prize through neutral waters even when it anchored in the harbor of a neutral port in the course of such voyage did not operate of itself to liberate it. In the case of the *Thorsten* it declared that there was no principle of international law which justified such a contention; on the contrary, the Thirteenth Hague Convention, Article 10, expressly states that the neutrality of a power is not violated by the simple passage through its territorial waters of warships with their prizes. In order that a state should have the right to demand, as the appellants contended, that prizes belonging to its nationals be released when conducted through its own waters, it would be necessary that such passage constitute a violation of neutrality, as would be the case where a ship, regardless of its nationality, is captured in its waters. A reading of the discussions at the Hague Conference, said the Prize Court, left no doubt that it was not the intention of the conference to sanction the principle contended for by the appellants and it called attention to the rejection of an amendment proposed during the discussion of Article 23 of the Thirteenth Convention, to the effect that a prize brought into a port of its own country should be set free.[3] If, therefore, the fact of taking a prize into a neutral port did not operate to set it free, still less would the simple passage through neutral waters have such effect.[4]

[1] I, *Entsch.*, 103, 253; Fauchille et De Visscher, *Jurispr. All.*, 79.
[2] *Ibid.*, 392; *ibid.*, p. 299.
[3] On this point the Court cited Einicke, *Rechte und Pflichten der Neutralen Mächte im See Kriege*, p. 321. Compare also the case of the *Mercur* (27 *Rev. Gén.*, 1920, *Jurispr.*, 69), where the French Prize Council held that the taking of a prize, captured by the French naval forces, through the Kiel Canal did not operate to relieve the prize of the consequences of capture.
[4] But in the case of the *Themis* Germany yielded to the demand of the

Sec. 171. Violation of the Twenty-four Hour Rule. The interpretation and application of the rule of the Thirteenth Hague Convention (Art. 12) relative to the sojourn of belligerent warships in neutral ports, roadsteads and territorial waters for more than 24 hours appears not to have been raised before any of the Prize Courts. The Prize Court for Egypt, however, had occasion to pronounce upon the identical rule of the Suez Canal Convention, in the case of the *Südmark*,[1] which involved the status of a prize which had been brought into the port of Suez by her British captor and which remained there for a longer period than 24 hours, in violation of the Convention. The claimants argued that the prize having been detained there in breach of the Convention it ought to be released. But the Prize Court held, and the decision was affirmed by the Judicial Committee, that it had no power or duty to release the prize, since the question was one which lay outside the jurisdiction of a Prize Court.[2] The decision of the United States Supreme Court in the case of the *Appam* did not, said the Judicial Committee, have any application to the present case. It concluded:

"If the neutral allow the prize to remain longer than is warranted by the circumstances, it is no doubt guilty of an unneutral act, which may well be made the subject of diplomatic complaint. But their Lordships cannot think that the captor's Prize Court has any jurisdiction to entertain the question, or is bound, if it consider that there has been an unneutral act, to release the prize on that account."

Sec. 172. Right of a Belligerent to Bring Prizes into a Neutral Port. The "Südmark." By Article 21 of the XIII Hague Convention a prize may be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. But it must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey the order the neutral power must employ the means at its disposal to release it, and intern the prize crew. By Article 23 a neutral power may allow prizes to enter its ports and roadsteads when brought there to be sequestrated pending the decision of a Prize Court. The governments of Great Britain, Japan, Siam, and the United States, however, reserved their ratification to this article.[3]

Swedish government and released a vessel which had been brought by the captors into Swedish territorial waters.

[1] VI, Lloyd 343; II, Br. & Col. Pr. Cas., 473. [2] See Sec. 49, *supra*.

[3] Scott, *The Hague Conventions and Declarations of 1899 and 1907*, p. 214.

The Judicial Committee of the Privy Council commenting on this Article, in the case of the *Südmark*,[1] said: "according to the rules of international law, a prize may, under certain circumstances, be taken into a neutral port, but its right to remain there is limited by the continued existence of the circumstances. When these circumstances cease to exist, it is the duty of the neutral to order it to leave forthwith, and if it fail to leave to cause its release." But as stated above, the Prize Court has no jurisdiction to release it.

Sec. 173. The Same. Case of the "Appam." The interpretation of the Convention came before the Supreme Court of the United States in the case of the *Appam*,[2] a British merchant vessel captured by a German auxiliary cruiser (the *Möwe*) and brought into an American port (then neutral), not by the cruiser making the capture but by a German prize crew placed on board the *Appam*, and with the forced assistance of the English crew. A libel was instituted by the British government in the United States District Court to recover possession of the vessel on the ground that Germany had no right either by treaty or international law to take the vessel into an American port. The German government contended that under the treaty of 1828 between the United States and Prussia, Germany not only had a right to bring the vessel into an American port but also to keep it there as long as it pleased, and it denied that the American courts had any rightful jurisdiction of the case.

The District Court, however, held that it had jurisdiction and that the vessel had no right to enter a port of the United States; that it came in without the permission of the American government; that the manner of bringing it in constituted a violation of the neutrality of the United States; that in consequence it was in an American port in violation of law, as between the captors and owners, it was in the position of an abandoned or stranded ship and that the owners were entitled to restitution.[3] The pro-

[1] VI, Lloyd, 343; II, Br. & Col. Pr. Cas., 473.

[2] 243 U. S., 124. This was not a prize case but an admiralty suit brought in the court of a neutral power by a belligerent to recover possession of a vessel.

[3] English text of the decision in 11 *Amer. Jour.* 872. Dr. J. B. Scott (10 *Amer. Jour.*, p. 831) raises the question whether the mere entry of the *Appam* into an American port for the purpose of laying up, under the claim of a treaty right, was in itself such a violation of neutrality; to justify the Court in restoring it to its original owners, in view of the fact that it had been allowed to enter and had not been notified by the government that its entrance was contrary to the treaty and also in view of the fact that the Secretary of State had informed the British ambassador that he could not accept his suggestion that the presence of the *Appam* constituted a violation of neutrality.

vision of the Prussian-American treaty which the German government invoked, had reference, said the Court, only to prizes brought into American ports by the vessels making the capture and not to prizes entering as did the *Appam*, unaccompanied by the captor vessel. Moreover, the treaty contemplated entrance only as a temporary asylum for vessels of war accompanying their prizes and not the deposit of spoils of war in American ports. Adverting to Article 21 of the XIII Hague Convention, which the German government argued was not applicable because not ratified by Great Britain but which the British government claimed was merely declaratory of the customary law and therefore binding notwithstanding non-ratification by Great Britain, the Court pointed out that it allowed prizes to be brought into neutral ports only on account of unseaworthiness, stress of weather, and want of fuel or provisions,[1] exceptions which did not apply to the *Appam*.

The decision of the district court was affirmed, upon appeal, by the supreme court. The bringing of the *Appam* into an American port was, said the Court a breach of American neutrality, it was not brought in in accordance with the provisions of the Prussian-American treaty, nor for the purposes of temporary asylum as contemplated by that treaty, nor in accordance with the letter or spirit of the Hague Convention. It was a case of prize not brought in by the ship capturing it but sent in unaccompanied by the captor and sent in not because it was unseaworthy or without supplies but for the purpose of being laid up and kept there indefinitely. "The principle of international law recognized by this government," said the supreme court, "leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute the ports of a neutral country harbours of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept." The United States had reserved its ratification to Art. 23, which authorizes neutrals to permit prizes to be brought into their ports to be sequestrated pending the decision of a Prize Court, because it was felt that it might involve the country in foreign wars to the extent of giving asylum to prizes which belligerents might not

[1] As Dr. Scott points out, it is difficult to see how the failure of Great Britain to ratify the Convention affected the rights and duties of the United States (10 *Amer. Jour.*, p. 816). The United States while reserving its ratification of Article 23 had ratified Arts. 21 and 22. It was therefore free to determine its own action in the matter.

be able to conduct into their home ports. Finally, the Court stated that the failure of the United States to proclaim at the outset that its ports would not be open for such purposes did not justify attempts on the part of belligerents to bring their prizes into them and store them there indefinitely as spoils of war.[1]

Sec. 174. Question as to Status of Albanian and Egyptian Ports. The question was raised in several cases as to whether particular waters in which captures took place were neutral or enemy. Thus notwithstanding the organic act of 1913 for the establishment of the State of Albania, whose situation during the war was somewhat anomalous[2] the belligerent powers did not recognize it as a neutral state. Its territory was occupied and a number of Austro-Hungarian vessels were seized by the Italian naval forces in the port of Durazzo or in other Albanian territorial waters and captures were similarly made in its waters by the Austro-Hungarian forces.[3]

Concerning the status of Egyptian ports prior to the proclamation of the protectorate in December, 1914, and before the entrance of Turkey into the war, the Prize Court of Egypt and the Judicial Committee of the Privy Council held that in consequence of the English occupation Egypt could not be regarded as neutral territory and that as against Germany and Austria-Hungary Egyptian ports must be treated as enemy ports within the meaning of the VI Hague Convention. In the case of the *Gutenfels*,[4] a German vessel seized at Port Said in October, 1914,

[1] See further as to this case Secs. 68-69, *supra*. There is a considerable literature dealing with the case of the *Appam*. See especially Coudert, "the Appam Case," 11 *Amer. Jour.*, 302 ff; Burchard, "The Case of the *Appam* and the Law of Nations," 11 *ibid.*, 270 ff; Scott, editorials 10 *ibid.*, pp. 104 ff and 809 ff; C. D. Allin in Minnesota Law Review, Jan., 1917; Bellot, Grotius Society Publications II, 11 ff. See also *Diplomatic Correspondence Between the United States and Belligerent Governments Relating to Neutral Rights and Commerce*, European War, No. 3, pp. 331 ff and the Same Correspondence in Special Supp. to 10 *Amer. Jour.*, 387 ff.

[2] See my *International Law and The World War*, Vol. I, p. 38.

[3] Verzijl, *op. cit.*, pp. 238, 254, 283.

[4] IV, Lloyd, 336; I, Br. & Col. Pr. Cas., 102 and 2 *ibid.*, 36. Judge Grain of the Egyptian prize court in this case discussed exhaustively and with learning the status of Egypt and particularly the question whether its ports were neutral or enemy ports. After reviewing the conduct of Turkey since the beginning of the war and adverting to the view which the Egyptian authorities took of the status of the country, Judge Grain said: "Next to be considered is the view that Great Britain took of the status of Egypt. By the Hague Convention, No. XIII, of 1907, in article 4, it is laid down that "A prize court cannot be established by a belligerent or neutral territory . . ." But in Egypt a prize court has been established by Great Britain. Incidentally I may say that for the purposes of my argument in this case it is not necessary to find that Egypt is either a British dominion, possession, or colony, because, as stated by Pitt Cobbett in his book on *International Law*, vol. ii, p. 192, 'in principle it would seem that a prize court may rightly be established in the territory of an ally or co-belliger-

before the outbreak of war between Great Britain and Turkey and before the proclamation of the British protectorate over Egypt, Lord Wrenbury, speaking for the Privy Council, said: "The question has been argued whether Port Said was, within the meaning of the Hague Convention, an 'enemy port,' " that is, a port enemy to Germany. Having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the military occupation of Egypt by Great Britain, their Lordships do not doubt that it was. In Hall's *International Law,* sixth edition, p. 505, the learned author writes: " 'When a place is militarily occupied by an enemy, the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil. Their Lordships think this to be right.' "

This decision was followed by the Privy Council in the case of the *Achaia,* a German vessel seized in the port of Alexandria in August, 1914,[1] and in the case of the *Marquis Bacquehem,* an Austrian steamship which entered the port of Suez in the same month.[2]

The Austro-Hungarian Prize Court also considered Alexandria and Port Said as enemy ports, at least in December, 1914, after the proclamation of the British Protectorate.[3]

ent.' It might perhaps be urged that the treaties with Turkey regarding capitulations (which by the way Turkey has abolished without the consent of the other contracting parties) would give the right to Great Britain to establish a prize court in Egypt; but for various reasons I am of opinion that they would not, and only mention it in order that it may not be suggested that this point has not been considered by me. We now have the evidence of both States before us; that of the Regent and Ministers of Egypt, who declare that all ships captured in Egyptian ports shall be handed over for judgment to the British prize court; and we have the Act of Parliament instituting the prize court in Egypt, which they had no power to do, unless Egypt was either an ally or co-belligerent in possession. I cannot, therefore, on the evidence which is at present before me, avoid finding that Port Said at the period in question was not a neutral port. I do not know that it is necessary to go further than that, but if necessary I am prepared to find that it was a port of an ally."

[1] V, Lloyd, 63; II, Br. & Col. Pr. Cas., 63.

[2] V, Lloyd, 79; II, Br. & Col. Pr. Cas., 58.

[3] See the cases of the *Dante* and the *Colenso,* cited by Verzijl, *op. cit.,* p. 284.

CHAPTER VI

ENEMY VESSELS EXEMPT FROM CAPTURE: FISHING VESSELS, HOSPITAL SHIPS, SMALL BOATS ENGAGED IN LOCAL TRADE, ETC.

I

Provisions of the Hague Conventions of 1907

Sec. 175. The Eleventh Convention. The Eleventh Hague Convention exempts from capture the three following categories of enemy vessels: (1) vessels used exclusively for fishing along the coast, (2) small boats employed in local trade and (3) vessels charged with religious, scientific, or philanthropic missions. By the express terms of the Convention the immunity of the first two classes of vessels ceases whenever they take any part whatever in hostilities and doubtless the same rule would be applied in the case of the third class. By the so-called "solidarity clause" (Art. 9), the provisions of the Convention apply only as between the contracting parties and then only when all the belligerents are parties to the Convention.

Sec. 176. The Tenth Convention. The Tenth Convention likewise exempts from capture military hospital ships constructed or assigned by states "specially and solely with a view to assisting the wounded, sick and shipwrecked, the names of which have been communicated to the belligerent powers at the commencement of or during the course of hostilities." Likewise, hospital ships equipped wholly or in part at the expense of private individuals or officially recognized relief societies are exempt from capture, provided they are furnished with a certificate from the competent authorities and have been officially commissioned and notified to the hostile power before they are employed. The exemption also applies to hospital ships equipped wholly or in part at the expense of private individuals or officially recognized societies of *neutral* countries, provided they have been placed under the control of one of the belligerents with the previous

consent of their own government and with the authorization of the belligerent himself and provided that the latter has notified their names to his adversary before they are employed. Further conditions are also specified such as the duty of such ships to give assistance and relief to the sick, wounded, and shipwrecked of all belligerents without distinction of nationality, the duty to abstain from participation in hostilities, the duty to carry certain distinguishing marks, etc. The immunities provided for in both Conventions are embodied in the prize regulations of most of the states whose prize jurisprudence is here examined.[1]

II

Fishing Vessels

Sec. 177. Case of the "Berlin." In the case of the *Berlin*,[2] Sir Samuel Evans was called upon to decide whether a German fishing vessel of 110 metric tons, which it was shown had been engaged in deep sea fishing and in a "commercial enterprise" which formed part of the trade of the enemy, belonged to the category of coastal fishing vessels exempt from capture under the provisions of Article 3 of the Eleventh Convention. The Crown argued that although the Convention had been ratified by both Great Britain and Germany it had not been ratified by all the belligerents, and therefore under the terms of the so-called solidarity clause (Article 9) it was not binding upon Great Britain, during the existing war. Alternately, the Crown argued that even if it were applied the *Berlin* did not fall within the category of vessels "employed exclusively in coast fishing," as was shown by the places where she had been fishing, and also by her size and by her equipment. The authority of various text writers [3] was cited in support of the rule that enemy vessels engaged in deep sea fishing, as the *Berlin* was, had never been regarded as being exempt from capture, and reliance was also had upon the decisions of the United States Supreme Court in the cases of the *Paquête Habana* [4] and the *Lola*.[5]

Regarding the contention of the Crown relative to the inapplicability of the Eleventh Hague Convention during the existing

[1] The terms of the Sixth Convention are discussed in the next chapter.
[2] II, Lloyd, 43; I, Br. & Col. Pr. Cas., 29.
[3] Notably Hall, *International Law* (6th ed.), p. 447; Westlake, *International Law*, part II, p. 155, and Holtzendorff, *Handbuch des Völkerrechts*, vol. 4, p. 585.
[4] 175 U. S. 677 (1900). [5] 189 U. S. 453 (1900).

war, Sir Samuel Evans stated that he would make no pronouncement on the question as to whether the German Empire or its nationals had any right to invoke the benefits of any of the Hague Conventions but would confine himself to a review of the practice of nations in respect to the treatment of enemy fishing vessels. There was, he said, no reported case in England in which the immunity of such vessels had ever been recognized as a part of the law of nations, but, nevertheless, he was of the opinion that after the lapse of a century it had become "a sufficiently settled practice of the law of nations that fishing vessels, plying their industry near or about the coast (not necessarily in territorial waters) in and by which the hardy people who man them gain their livelihood, are not properly subjects of capture in war, so long as they confine themselves to the peaceful work which the industry properly involves." This rule, he said, was that which had been formulated and stated by Westlake and the reason upon which it was founded had been explained by Hall,[1] namely, that coasting fishery being the sole means of livelihood of a very large number of inoffensive people, the seizure of their boats would inflict extreme hardship upon their owners without at the same time resulting in any important military advantage to the captor.

Having decided that the immunity of the class of fishing vessels referred to above existed as a settled doctrine of the law of nations, apart from conventional arrangements, the only question to be decided in this case was whether the *Berlin* came within this category. Sir Samuel relied mainly upon the opinion of Mr. Justice Gray in the case of the *Paquête Habana*—an opinion which he said was "full of research, learning and historical interest." While affirming that the immunity had become an established rule of international law which prize courts were bound to take judicial notice of and give effect to in the absence of treaties or municipal law, Mr. Justice Gray added that it did not of course apply to vessels engaged in the taking of whales or seals or cod or other fish which are not brought fresh to market,

[1] *Op. cit.*, p. 446. The foundation of the immunity is also stated by Mr. Justice Gray of the United States Supreme Court in the case of the *Paquête Habana* decided before there were any Conventional rules dealing with the subject. Affirming that the precedents and the authorities demonstrated that by the general consent of civilized nations, and independently of treaties, the immunity of fishing vessels subject to certain exceptions and conditions, had become "an established rule of international law"; that is, what was in the beginning merely a rule of comity had developed into a rule of law. Mr. Justice Gray added that the rule was "founded on considerations of humanity to a poor and industrious order of men."

but are salted or otherwise cured and made a regular article of commerce. Sir Samuel also referred to two decisions of the Japanese Prize Court in 1905: the *Michael*[1] and the *Alexander*,[2] in both of which the Prize Court held that the exemption did not apply to vessels engaged in deep sea fishing. The rule laid down in these decisions he approved and as the size, equipment and nature of her voyage showed the *Berlin* to be a deep sea fishing vessel engaged in a commercial enterprise which formed part of the trade of the enemy country she was liable to capture and must be condemned.[3]

Sec. 178. No Application to Merchant Vessels. The "Evangelistria." In the case of the *Evangelistria*[4] the French Prize Council held that a *neutral* vessel (Greek) which had on board a document entitled "permit to navigate on the coast" and in which it was designated as a "fishing vessel" did not fall within the category of vessels employed exclusively in coastal fishing or in the service of petty local navigation, when it was established that at the time of capture it was not employed at all in fishing, that there was aboard no fishing apparatus and that coming from an enemy coast (Turkish) where it had taken aboard a cargo of fish bought for a third party and destined to a neighboring island, it must be considered as being engaged in the commercial enterprise of transporting merchandise. It was also established that the vessel had already twice during the same week landed on the coast of Turkey, notwithstanding the knowledge of the master that this coast had been blockaded for more than four months. The vessel was therefore not entitled to the benefit of Article 3 of the Eleventh Hague Convention and even if it were, it was condemnable for having violated a blockade. The importance of this decision consists in the fact that the immunity from capture which the Hague Convention confers upon a certain category of *enemy* vessels was refused to a *neutral* vessel.[5]

[1] Hurst and Bray, *Russian and Japanese Prize Cases* (1913), Vol. II, p. 80.

[3] Compare also the case of the steam whaling vessels *Sturmvogel* and *Seeadler*, seized in part at the outbreak of the war and detained until further order by the Prize Court of South Africa (So. Afr. cases 29), and the case of the *Stoer* (V, Lloyd, 18), a German trawler sunk in the North Sea. In the latter case the British Prize Court held that since the *Stoer* was engaged in fishing it was not coastal fishing and hence was not entitled to immunity from capture.

[4] Fauchille, *Jurispr. Franc.*, p. 423.

[5] Compare also the Case of the *Marbrouck* in which the French Prize Council held that a fishing vessel which had been employed in revictualling the blockaded parts of Syria was not entitled to immunity from capture.

III

Hospital Ships

Sec. 179. Case of the "Ophelia." In the case of the *Ophelia*[1] Sir Samuel Evans was called upon to decide whether a German auxiliary hospital ship was under certain circumstances exempt from capture under the Tenth Hague Convention. The *Ophelia* up to the outbreak of the war was a merchant vessel belonging to the Hamburg American Line. Shortly after the outbreak of hostilities she was refitted as a hospital ship for the German government and at the time of capture by a British warship she had on board a certificate which stated that she had been designed specially or solely with the object of giving aid to wounded, sick and shipwrecked persons, that she had been notified as such to the belligerent governments and that the German government had undertaken to employ her for no other purposes than those contemplated by the Hague Convention for the adaptation to maritime war of the principles of the Geneva Convention. She was properly painted as a hospital ship and was furnished with proper flags in accordance with the requirements of the Convention. Sir Samuel said he would avoid all inquiry as to whether the government of the German Empire was or was not precluded by its conduct during the war from invoking the benefits or protection of the Tenth or other Hague Conventions. Apparently, however, he assumed that the Tenth Convention was binding, since he proceeded to examine at length its terms with a view to determining whether the *Ophelia* came within the category of vessels protected by it. The question for decision therefore was mainly a question of fact, namely, whether the ship was being used solely for the humane and justifiable purposes contemplated by the Convention.[2] This involved an examination of the construction and equipment of the ship, an inquiry into the conduct of the officers in charge and a consideration of all the facts and inferences deducible therefrom relative to the activities and services in which the vessel had been engaged. This examination showed that the vessel had on board a large number of lights and rockets for signalling, of which no satisfactory account was

[1] III, Lloyd, 13; I, Br. & Col. Pr. Cas., 210.

[2] The only question in the nature of a point of law involved in the case arose in connection with the provision of the Convention that the presence of wireless telegraphic apparatus on board a hospital ship does not constitute a sufficient reason for withdrawing the protection of the Convention.

given; that when she was about to be boarded a number of books and documents were thrown overboard and subsequently others were burnt; that the speed of the vessel was greater than that which had been sworn to by the witnesses; that wireless messages in code had been sent to a German signalling station on land, the records of which had likewise been destroyed; that the vessel had previously made at least two voyages, of the nature and purpose of which there was no record; that she was not well-adapted for the purposes of a hospital ship; and that in fact she had never rendered or attempted to render any assistance or service whatever to any wounded, sick, or shipwrecked person—indeed there had never been any such person aboard and no cot, bandage or surgical instruments had ever been employed.

Sir Samuel readily admitted that some of these circumstances, such as the fact that the vessel had not actively rendered any service to the sick or wounded, were not in themselves conclusive as to the guilt of the ship, but taken all together they created a strong presumption which had not been rebutted. The failure to keep records of messages communicated by signalling and wireless apparatus of which there was aboard an unusually large supply for a hospital ship, the inability of the officers in charge to give satisfactory explanations of various activities of the vessel and especially the spoliation of the ship's papers, were matters to which the learned judge attached great weight.[1] Regarding the spoliation of documents as presumptive evidence that they contain information which would insure condemnation, he quoted from the opinion of Dr. Lushington in the *Johanna Emilie*[2] and from *Kent's Commentaries on American Law*,[3] both of which he said enunciated sound and salutary doctrines and were in a special sense applicable to vessels claiming to be hospital ships, whose records, he added, ought to be "clean" and about whose innocence there ought to be no question. If their records are clean their preservation would be an additional safeguard against capture; if they are destroyed the inference that, if produced, they would be silent but eloquent witnesses of guilty practices, would be strong. Even wireless telegraphic codes against the destruction of which the Crown did not complain, should, in his opinion, have been preserved, since they might be required to test the accuracy of the versions given of messages sent and received.

[1] See further as to this, Sec. 90, *supra*.
[2] Spinks, pp. 20, 22; 2 Eng. P. C., pp. 262-4 (1854).
[3] 12th Edition, p. 158.

On the basis of these facts and the inferences which Sir Samuel thought were logically deducible from them, he came to the conclusion that the *Ophelia* was not constructed, adapted or used for the special and sole purpose of affording aid and relief to the wounded, sick and shipwrecked; that, on the contrary, she was adapted and used as a signalling ship for military purposes and was not therefore entitled to the benefits of the Hague Convention and being an enemy ship must be condemned as lawful prize.

The case was appealed to the Judicial Committee which affirmed the judgment of Sir Samuel Evans.[1] The Attorney-General contended that the findings of the court below should be regarded as conclusive and he cited various decisions in support of this view. The Judicial Committee, however, pointed out that the cases relied upon by him were decisions on appeal from the admiralty court in collision cases and not prize cases and that the appeal must be treated as a rehearing the same as appeals to the Court of Appeal from a judge sitting without a jury in the High Court. The Judicial Committee had jurisdiction therefore to review the findings of Sir Samuel Evans in regard to the facts of the case. In the main the Judicial Committee agreed with his conclusions. It agreed with him that the *Ophelia*, although equipped with fittings appropriate to a hospital ship was not, according to British requirements, at all well-adapted and fitted for hospital service and was not therefore "solely" adapted for such purposes; that her equipment of signalling apparatus was largely in excess of the requirements of a *bona fide* hospital ship; that the enormous number of Verey signal lights (1260) which she carried was practically conclusive that she was specially equipped for illegitimate signalling and that on these findings alone Sir Samuel was justified in condemning the ship. The Judicial Committee, however, did not base its conclusions upon these findings alone but entered into a detailed examination of the actual use to which the vessel had been put and it found, as Sir Samuel had, that various of its activities were highly suspicious and of which no satisfactory explanation was furnished. Their Lordships said they were unable to conceive of any necessity which would justify a hospital ship in sending messages by a secret code and if such messages were sent a clear and satisfactory record of them ought to be kept. It was a long established custom of the sea, they said, for vessels to keep full and correct logs showing all that happens on the ship. In some

[1] III, Lloyd, 13; II, Br. & Col. Pr. Cas., 150.

countries the log is legal evidence of the matters which it contains and in the English law courts it is treated as of very great weight in all disputes arising out of or in connection with the voyage. In the Prize Courts the importance attached to the log was especially great. It had become a common practice for vessels to keep a separate signal log and this duty was especially incumbent upon a hospital ship. If only innocent signals were made by the *Ophelia*, as was contended, the signal log was the very document of all others which should have been preserved instead of being thrown overboard. The Judicial Committee then dwelt upon the serious consequences resulting from the spoliation of documents which had been committed by the officers of the *Ophelia*, first, in throwing overboard when the vessel was about to be searched various documents including the signal log which contained the messages sent, and second, in destroying after capture the records relating to the stock and consumption of signal lights. If, as the Captain of the *Ophelia* contended, the signal book contained only innocent messages there was no reason for destroying it. It was reasonable to conclude, therefore, that it was destroyed because something wrong had been done which would have been disclosed by its preservation. The same conclusion, their Lordships added, must be drawn from the destruction of the stock book of signal lights. They were therefore of the opinion that the evidence disclosed facts of which no satisfactory explanation was or could have been given and that the president of the Prize Court was fully justified in finding that the *Ophelia* was not constructed, adapted or used for the special and sole purpose of affording aid and relief to the wounded, sick and shipwrecked; that on the contrary she was adapted and used as a signalling ship for military purposes and must therefore be condemned as lawful prize.[1]

Sec. 180. Italian Case of the "Oceania." The only other reported case involving the status of a hospital ship was that of the *Oceania* decided by the Italian Prize Commission on November 12, 1918.[2] The *Oceania* was an Austro-Hungarian vessel which had been fitted out as a hospital ship by the Austro-Hungarian government and notified as such to the Italian govern-

[1] The German government issued a white book entitled *Denkschrift der Deutschen Regierung im Sachen der Beschlagname des Hilfslazarettschiffs "Ophelia" durch Britische Seestreits-Krafte*, in which it denounced the condemnation of the *Ophelia* as being contrary to the Hague Convention and asserted that she was a *bona fide* hospital ship which had never been used for military purposes.

[2] Fauchille et Basdevant, *Jurispr. Ital.*, p. 468.

ment on July 1, 1918. On the 29th of October, 1918, two days before her capture, the Italian government was notified that the vessel was no longer employed as a hospital ship. At the time of her capture the vessel was, moreover, in a state of abandonment. In these circumstances the Prize Commission condemned the ship as lawful prize. Although the nationality of the vessel was Austro-Hungarian, by reason of the flag which she was entitled to fly the owners were an Italian Company established at Trieste. Under the terms of the decree of June 24, 1915,[1] the Prize Commission was authorized whenever it found that the owners of enemy ships or goods captured and confiscated as good prize, were persons of Italian nationality, *originaires* of regions subject to Austro-Hungarian domination, it might suspend the sale of such ships and goods and inform the Italian government thereof, which might if it chose, restore the condemned property to the Italian owners. Counsel for the owners of the *Oceania* appealed to the Prize Commission to adopt this procedure but it declined to do so and held that the claimants were not entitled to the benefits of the decree, apparently because the flag which the vessel was entitled to fly and which she actually flew was conclusive as to the nationality of the ship and, being an enemy flag, she must be confiscated.

These were the only cases involving the immunity of hospital ships which came before the Prize Courts, although there were a good many instances of the illegal destruction of such vessels, for the most part by German submarines.[2]

IV

Small Boats Employed in Local Trade

Sec. 181. Case of the "Maria." No Immunity According to Customary Law. Article 3 of the Eleventh Hague Conven-

[1] Text, *ibid.*, Annexe, p. XIII.

[2] As to the details see my *International Law and the World War*, vol. I, pp. 506 ff., and the sources there cited. In two of these cases, the *Dover Castle* and the *Llandovery Castle*, the criminal responsibility of the commanders of the submarines which sunk them was passed upon by the German Imperial Court at Leipzig. In the first case it was held that Commander Neumann, who was charged with having torpedoed the *Dover Castle* without warning and with exceptional brutality, was not liable to punishment because he acted in obedience to superior orders. In the second case, two officers of the submarine which sank the *Llandovery Castle* were condemned to four years imprisonment for firing upon the survivors while they were trying to escape in the life boats. See texts of the decisions in 16 *Amer. Jour. of Int. Law*, pp. 704 and 709.

tion exempts from capture "small boats employed in local trade." In the case of fishing vessels, their immunity from capture was recognized by the Prize Courts as being an established rule of customary law and existed independently of conventional agreements. In the case of the *Maria*[1] the Prize Court for Egypt was called upon to decide whether the immunity established by the Convention could be invoked by an enemy owner who was the national of a State (Turkey) which had not ratified the Convention. The claimant admitted that the Convention as such was not applicable because of non-ratification by his government but he maintained that the rule embodied in Article 3 was merely declaratory of a practice and rule of law which had become established before the Convention was signed and was therefore binding upon the Court as a rule of customary law, irrespective of the status of the Convention in which it was embodied. In support of this proposition the claimant relied upon the decisions in the cases of the *Berlin*, the *Paquête Habana* and the *Lola* which, although they involved fishing vessels, covered equally small vessels like the *Maria* engaged in the coasting trade. Judge Grain, however, was of the opinion that Sir Samuel Evans' "dictum" in the case of the *Berlin* to the effect that the immunity of coast fishing vessels had become a settled doctrine and practice of the law of nations, applied only to "small fishing boats belonging to men who are earning their livelihood and supplying the food of small communities on the coasts," and not to general trading vessels like the *Maria* which was a ship of 27 tons engaged in the general coasting trade. It was, therefore, liable to capture and confiscation and must be condemned. Unlike the immunity of fishing vessels, that of small boats engaged in local trade, had no existence apart from the Hague Convention.

Sec. 182. Tugs, Lighters, and Motor Boats. In the case of the *Floating Craft of the Deutsches Kohlen-Depôt, Port Said*,[2] Judge Grain held that certain tugs, motor boats and lighters belonging to a German firm and employed for the purpose of supplying coal to ships touching at Port Said did not come within the category of "small boats employed in local trade." Adverting to Hall's statement of the reason upon which the immunity of coastal fishing vessels is founded, namely, the injustice of inflicting hardship upon poor and inoffensive people who gain their livelihood by fishing, Judge Grain expressed the opinion

[1] I, Br. & Col. Pr. Cas., 259.
[2] VIII, Lloyd, 138; II, Br. & Col. Pr. Cas., 439.

that the foundation for the exemption of "small boats employed in local trade" was the same as in the case of fishing vessels. The trading boats which the Convention had in mind, he thought, were such as passed to and from small villages and ports on the coast and which belonged to poor men engaged in earning their living by carrying food to such places. The owners of the tugs, motor boats and lighters in this case, however, were not men of this class or occupation; they were a rich and powerful company engaged in serving extensively the maritime commerce of Germany; their tugs and lighters did not therefore fall within the category of such small boats as were protected by the Hague Convention. Sir Samuel Evans reached the same conclusion in the *Vulcan Coal Company* case[1] which involved the status of tugs and lighters used for discharging colliers and bunkering steamships at Port Said. The opinion of Judge Grain in the *Deutsches Kohlen Depôt* case on this point was affirmed on appeal to the Judicial Committee.[2] Lord Sumner adverting to the French text of the Eleventh Convention (*Bateaux exclusivement affectés . . . à des services de petite navigation locale*) said:

"For some reason, which is not apparent, the French text makes the element of size a quality of the service in which the craft are engaged: in the English it is a quality of the craft themselves. In the present case it is difficult to describe either the craft or the navigation in which they engage as 'small.' As applied to the navigation the words evidently predicate of it a petty, local character. These craft are an integral and indispensable adjunct of most important ocean voyages, and without them voyages through the Suez Canal would be impracticable. Their service is the reverse of petty or local. Nor are the craft themselves truly small. The tugs must be of high power, and their mere tonnage and dimensions are therefore not decisive. Few of the barges are even of modest size; none are insignificant, and most of them are of ample burden. Their Lordships will not imitate the learned judge below in treating the penury or the opulence of those engaged in the traffic as determining the claim of the craft to protection, though this feature may not be without its importance, but they are satisfied that whatever be the precise limits of this Article, it was never contemplated that such craft as these should fall within them, and they think the same of the argument that they can be assimilated to fishing boats, so as to entitle them to the tenderness which has often been extended to fishermen under international law." [3]

[1] VIII, Lloyd, 146, note, proceedings transferred from the Prize Court for Egypt to the English Prize Court.
[2] VIII, Lloyd, 147; III, Br. & Col. Pr. Cas., 264.
[3] See further as to this case, Sec. 381, *infra*.

Sec. 183. Other British Cases. The decision in the *Deutsches Kohlen-Depôt* case that tugs and lighters used for loading and unloading or supplying with coal trans-oceanic vessels in a particular port were not "small boats employed in local trade" and as such entitled to the benefit of the Eleventh Hague Convention was followed by Lord Sterndale in the case of the *Anichab* and *Other Vessels and Craft.*[1] The only difference between the craft in this case and those in the Port Said case was that the latter were larger of tonnage. The former ranged in tonnage from seven to fifty tons in the case of the wooden lighters, and the iron lighters were of seventy-five tons. There were also some rafts of eighteen tons. They were all employed in connection with loading and unloading, and the removing of passengers and otherwise facilitating the operations of the steamers of a German line at Luderitz Bay and Swakopmund in German South-West Africa. Lord Sterndale did not think the smallness of their size was so much the test of their character, as the use to which they were being put, namely, the rendering of assistance to German trans-oceanic steamers which were engaged in trading to South Africa. On the authority of the *Deutsche Kohlen Depôt Gesellschaft* case he held therefore that they were not exempt from capture and condemnation.

In the case of the *Atlas and Lighters*[2] the Supreme Court of Jamaica, sitting in prize, held that neither Article 1 of the Sixth Hague Convention, nor Article 3 of the Eleventh Convention, which respectively allow days of grace to belligerent merchant ships in an enemy port at the commencement of hostilities and which exempt from capture small boats employed in local trade, applies to tugs and lighters used exclusively in harbour work in a particular port. The Crown argued that "merchant ships"—*navires de commerce*—referred to in the Hague Convention, meant sea-going vessels engaged in carrying merchandise from one port to another and not tugs and lighters employed in a particular port and that the term "merchant ship" used in the British merchant shipping act did not embrace such craft. Chief Justice Coll in making an order of condemnation said he was satisfied that neither the tug nor the lighters came within the category of vessels which the two Conventions intended to protect.

Sec. 184. Italian Cases. The "Cervignano" and "Friuli." The Italian Prize Commission held in the case of the *Cervignano*

[1] IX, Lloyd, 118; III, Br. & Col. Pr. Cas., 612. See also Secs 52 and 156, *supra*.
[2] II, Br. & Col. Pr. Cas., 470.

et Friuli[1] that small enemy boats of about 100 tons burden captured in an enemy river port which had been engaged in river navigation in continuance of maritime navigation and which were designed for ocean navigation for commercial purposes, were not exempt from capture as small boats engaged in local trade, in the sense of Article 3 of the Eleventh Convention, when their normal destination was to make voyages and transport merchandise from the port of Cervignano to Grado and Trieste. Even if they came within the category of small boats referred to in the Hague Convention that protection could not be invoked in the face of Article 1 of the Italian Prize Instructions of July 15, 1915,[2] which exempted from capture only coast fishing vessels and vessels employed in petty local navigation, which *did not exceed five tons burden,* vessels employed on religious, scientific or philanthropic missions and hospital ships. The fact that the owners, although subjects of Austria-Hungary, were of Italian nationality and had Italian sympathies, did not affect the liability of the vessels to capture.

Sec. 185. Other Italian Cases. In the case of the *Leonilda and Ottilia*[3] the Italian Prize Commission condemned an Austrian tug of more than five tons burden which was employed in loading and unloading ships in an Austrian river and also the hulls of certain old torpedo boats, superior to five tons burden, which were used for river and maritime transport purposes. All were treated as "merchant vessels" not belonging to the category of small boats protected by the Hague Convention. The fact that they were captured, not at sea or in the territorial waters of the enemy but in river basins of Austria did not affect the validity of the captures. It was also pointed out that they were not utilized exclusively in the interior waters of the enemy but were adapted equally to coastwise navigation. As in the preceding case, the Commission declined to consider the circumstances that the owner although an enemy subject was Italian by nationality and sympathy.

A somewhat similar question was raised in the cases of a number of small Austrian craft[4] of more than five tons burden which were captured by the Italians in an Austrian river (the Isonzato). They were employed for the transportation of merchandise and

[1] Fauchille et Basdevant, *Jurispr. Ital.*, p. 178. Compare also the cases of the *Nibbio*, the *Aquileia* and the *Grado*, *ibid.*, p. 166.
[2] Text, *ibid.*, Annexe, p. xviii. See also Sec. 145, *supra.*
[3] *Ibid.*, p. 195. See also Sec. 145, *supra.*
[4] *Ibid.*, p. 199.

although deprived of their motor power (a circumstance relied upon by the claimants) were held to be "merchant vessels" (*navires de commerce*) and not small boats employed in local trade in the sense of the Hague Convention. The Commission declared that they were capable of being utilized not only for river transportation but for the coasting trade and had in fact been so employed. The fact that the captures were made not at sea but in a river did not affect the legality of the capture, nor did the fact that the arm of the river in which they had been captured was not navigable, since it was an accessory of the sea and constituted a refuge or cover.

In the case of the *Beleno* [1] the Italian Prize Commission held that a sailing vessel of more than 17 tons burden belonging to an enemy subject registered as a merchant vessel, and engaged in the coasting trade and the transportation of passengers between enemy ports must be considered as a "merchant ship" and not a small boat employed in local trade in the sense of the Hague Convention. It was therefore not exempt from capture and the fact that it had been deprived of its motor and that it had been captured not at sea or in the interior waters of the enemy state but in a dry dock did not affect the legality of the capture. It was quite true as contended by the claimants, that the Italian Prize Regulations (Art. 5) referred only to captures made at sea or in the interior waters of the enemy but this language must not be interpreted in a restricted sense, otherwise the enemy might withdraw its ships from capture by placing them in dry docks or hauling them upon land.[2]

Sec. 186. Austrian Cases. In the case of the *Mukhbir-i-Sürur* [3] the Austro-Hungarian Prize Commission refused to award damages for the capture of an Albanian sailing vessel which had from time to time sailed under an enemy flag (Montenegrin) but which had been released on the ground that it was a neutral vessel. It held that the capture was justified and that the vessel did not fall within the category of coastal fishing vessels or vessels engaged in petty local trade for the reason that it was engaged in voyages which took it upon the high seas. The expression petty local trade (*Kleine lokalschiffahrt*), it said, was not the same as coastal trade (*Kustenschiffahrt*) but was a narrower conception. In the cases of the *Fiore I, Buonosorte,*

[1] *Ibid.*, p. 229.
[2] See also Sec. 296, *infra.*
[3] *Normal Verordnungs b'att für die K. u. K. Kriegs Marine* VIII, *Stück* (1915), p. 35.

Fiore II, Juda Verdi, and *Hailil*[1] the Commission refused to accord the benefits of the Eleventh Hague Convention to certain petty Montenegrin sailing vessels for the reason that they had been regularly employed by the government of Montenegro during the war.

Sec. 187. Chinese and Japanese Interpretation. In the case of the *Fortuna*[2] the Chinese Prize Court refused to accord the benefits of the same Convention to a German merchant vessel which prior to the war had been engaged in trade along the coast of China. Article 3 of the Convention, said the Court, was intended to protect only enemy ships engaged in coasting or local trade in *enemy country* and not those engaged in local trade in the belligerent country making the capture. "An enemy ship," it was said, "found in a belligerent country even if it were engaged in such trade, would not be protected, for the belligerent country itself can supply its own people without the help of the enemy. Therefore, no matter whether or not the ship *Fortuna* was, as alleged, by the appellant in the District Prize Court, engaged in trade between Foochow and Tsingtau and therefore in local trade, the fact that it was found within Chinese territorial waters justifies its capture."

In the case of the *Zuimo* the Japanese Supreme Prize Court interpreted the words "small boats engaged in local trade" to mean "nothing more than small craft engaged in shipping of the marine and agricultural products, and, in general, transportation with and among the neighboring islands, no steamship engaged in the coastal navigation being included." Consequently a ship belonging to a powerful German joint stock company, having a tonnage of more than one thousand tons and engaged in the transportation of goods on the Yangste River and along the far eastern coast, was not protected by the Convention against capture.

Sec. 188. View of the Prize Court of Siam. The Prize Court of Siam declined to extend the benefits of Article 3 of the Convention to certain German lighters belonging to the North German Lloyd Steamship Co. and employed in transporting merchandise between the river port of Bangkok and maritime anchorages situated outside the bar of the river, among other reasons, because the purpose of Article 3 in providing for the exemption of boats employed exclusively in petty local naviga-

[1] *Ibid.*, 18 *Stück* (1915), pp. 110 ff.
[2] Judgments of the High Prize Court of the Republic of China, p. 68, especially at p. 83.

tion was to protect only poor people who took no part in the war and who gained their subsistence from the use of their small boats. Besides, the German government had by an official communication of March 30, 1917, notified the Siamese government that it would not recognize the Convention as being in force during the existing war.[1]

V

Vessels Employed on Philanthropic Missions

Sec. 189. Case of the "Paklat." [2] This case, decided by the Supreme Court of Hongkong, in prize, involved transactions somewhat similar to that in the case of the *Hanametal*,[3] although in the latter case the charge against the ship was unneutral service, whereas in the present case it was an enemy vessel which claimed to be engaged on a philanthropic mission. The *Paklat* was a North German Lloyd liner captured by a British warship while bound from Tsingtau to Tientsin with a number of women and children refugees who were being taken from the former place, which although not actually blockaded at the time, was besieged by the Allied forces about a week later. The vessel, the owners claimed, had been requisitioned by the German authorities upon the outbreak of the war to carry women and children from Tsingtau to Tientsin, where it was intended to intern the vessel until the end of the war and to use it during the period of internment for the housing of such German women and children, and even those of any other nationality than Chinese, as did not have sufficient means to live on land. No passage money was charged for the transportation of the refugees which it carried and the vessel flew the parliamentary or white flag of truce.

Chief Justice Rees-Davies who gave the opinion of the Court, relied mainly on the interpretation which had been placed upon the purpose of Article 4 by the official report of the Second Hague Conference in which it was stated that the immunity of vessels engaged upon "philanthropic missions" was conditioned upon

[1] The *Chantaboon*, the *Patriu* and others, 46 Clunet (1919), 428. The German decisions as to whether enemy tugs and lighters were exempt from confiscation turned on the question as to whether they were or were not "merchant vessels" within the sense of the German Prize Code. As to the cases, see Sec. 207, *infra*.

[2] I, Br. & Col. Pr. Cas., 515.

[3] See Secs. I, 447, 450, *infra*.

their taking no part in the operations of the war and that the immunity contemplated conferred upon the vessel a sort of "neutralization." The decision of Mr. Justice Gompertz in the case of the *Hanametal* upon which the claimants relied, did not, the Chief Justice thought, support their contention that the *Paklat* was employed on a "philanthropic mission" because that was a neutral vessel whereas this was an enemy vessel. There was a fundamental difference between the "neutralization" of an enemy ship within the meaning of the official report of the Hague Conference and the neutrality of a non-belligerent ship. There are many things, he said, which the latter may do and which may "affect" the war without involving unneutral conduct. In such a case guilt of unneutral service must be established and the onus is on the captor. It was the failure of the Crown to discharge this onus which caused the Court to order the release of the *Hanametal*. To construe "philanthropic mission" in the sense contended by the claimants might lead to serious consequences; it might, for example, enable an enemy vessel to escape to a neutral port under the guise of "philanthropy." If the authors of the Convention had intended the immunity to cover the conveyance of non-combatants by an enemy ship from an enemy to a neutral port they would have employed more specific language leaving no doubt of their intention; perhaps they would have provided for a system of safe conducts such as is the custom in the case of vessels dispatched on scientific or religious expeditions. The *Paklat* was therefore condemned as a lawful prize of war.[1]

Sec. 190. German Decisions. School Ships and Belgian Relief Ships. In the case of the *Comte de Smet de Naeyer*[2] the German Supreme Prize Court held that a Belgian vessel owned by a navigation school and used for purposes of instructing naval cadets did not belong to the category of vessels charged with scientific missions and which are exempt from capture under Article 4 of the Eleventh Hague Convention. In the case of the *Haelen*[3] the German Prize Court at Kiel held that a vessel captured while en route from Montreal to Rotterdam with a cargo of grain consigned to the Commission for Relief in Belgium and which was intended ultimately for the civil population of Belgium even in that part occupied by France, belonged to the category of

[1] The reasoning of the Court in this case is criticized by Colombos (*op. cit.*, p. 155) as defective.
[2] I, *Entsch.*, p. 209; Fauchille et De Visscher, *Jurispr. All.*, p. 158.
[3] II, *Entsch.*, p. 177.

ships charged with philanthropic missions, so long as it had no other destination. But since it was captured in the German war zone notwithstanding the fact that its safe conduct prohibited it from navigating this zone, it was declared to have been lawfully captured. The Supreme Prize Court at Berlin affirmed the judgment of the lower court although it did not approve in all respects the reasoning of the latter. It is not easy to understand the reasoning by which this vessel was denied the immunity to which it was entitled by the Convention.[1]

[1] A number of vessels engaged in the service of the Commission for Relief in Belgium were torpedoed by German submarines. See details in my *International Law and the World War*. Vol. I, pp. 519 ff. See also the case of the *Amiral Gauteaume*, a French steamer which was torpedoed while transporting Belgian refugees from Belgium to England, *ibid.*, p. 505. The legitimacy of these acts was not brought before the Prize Courts.

CHAPTER VII

ENEMY VESSELS EXEMPT FROM CAPTURE (CONTINUED): SHIPS IN PORT OR ENCOUNTERED AT SEA IN IGNORANCE OF HOSTILITIES

I

The Sixth Hague Convention

Sec. 191. Analysis of the Convention. An examination of the provisions of this Convention will show that it exempts from capture four classes of enemy merchant vessels (*navires de commerce,* as they are designated in the French text). First are those which are in a "port" of the opposing belligerent at the commencement of hostilities. Second, those which have left their last port of departure and "entered a port" belonging to the enemy while still ignorant that hostilities have broken out. The Convention does not require that permission shall be granted to these two classes of vessels to leave but it expresses the *voeu* that "it is desirable" that they should be allowed to depart freely, either immediately or after a reasonable number of days of grace. Third, those which are offered days of grace in which to leave but are unable to avail of it within the period allowed because of circumstances of *force majeure.* Fourth, those which have left their last port of departure before the outbreak of war and are encountered on the high seas (*rencontrés en mer*), while still ignorant of the outbreak of hostilities. (Art. 3.) Such vessels are expressly exempt from confiscation though they may be detained without compensation, subject to the obligation of restoration at the end of the war, or may be requisitioned on payment of compensation. Those encountered at sea may also be destroyed, on payment of compensation, and those in port to which permission is granted to leave but which refuse to avail of the permission may be confiscated.

Sec. 192. Attitude of Belligerent Governments Toward the Convention. According to Article 6 the provisions of the Con-

vention are applicable only as between the contracting powers and then only when all the belligerents are parties to it. When the late war broke out several of the belligerents, or States which subsequently became belligerents, had not yet ratified the Convention, notably Bulgaria, Greece, Italy, Montenegro, Serbia, Turkey, and the United States, while Germany and Russia had reserved their ratification to Article 3 and paragraph 2 of Article 4.[1] Technically, therefore, the Convention was not binding upon any of the belligerents, although most of them announced their willingness to apply it upon condition of reciprocity.[2] The German Ambassador at Paris on the occasion of his *audience de départ* on the evening of August 3, 1914, handed the French Minister of Foreign Affairs a letter which stated that the German government would release French merchant vessels in German ports if, within forty-eight hours, Germany were assured of complete reciprocity. Similar notice was given to Great Britain, Russia, and Belgium.[3] The government of Austria-Hungary, upon assurance of reciprocity of treatment, granted days of grace during which British and French merchant vessels were allowed to leave Austro-Hungarian ports. Belgium did not expressly offer days of grace but the Belgian Prize Council stated in its decisions that no steps were taken to prevent German merchant vessels from leaving Belgian ports and that in fact they were free to leave during a period amounting to more than three days after the outbreak of hostilities.[4] The French government by a decree promulgated on August 4, 1914, announced that German merchant vessels actually in French ports since and including August 3 or which entered in ignorance of hostilities would be allowed seven full days in which to depart freely and to return directly, after having been furnished with a safe conduct, to their port of destination or such other port as might be designated by the authorities of the French port in which they were found.[5] By a decree of August twelfth the same rule was applied to Austro-Hungarian merchant vessels.[6]

[1] Scott, *The Hague Conventions and Declarations of 1899 and 1907*, p. 145.

[2] The policy of the various belligerent governments in respect to the Convention is treated by Fauchille, *Droit International Public, t. II Guerre et Neutralité*, pp. 554 ff.; Higgins, "Enemy Ships in Port at the Outbreak of War," *British Year Book of International Law*, 1922-23, pp. 55 ff.: Verzijl, op. cit., pp. 622 ff., and Garner, *International Law and the World War*, Vol. I, ch. VI.

[3] Fauchille, *op. cit.*, p. 555.

[4] See, among others, the *Elbing*, *Hanau* and *Tasmania*, *Moniteur Belge*, Dec. 10, 1919, and 47 *Rev. de Droit Int.* (1920), p. 277.

[5] Text in 22, *Rev. Gén.*, Docs., p. 9.

[6] Fauchille, *op. cit.*, p. 555.

Sec. 193. Policy of the British Government. The British government by Orders in Council of August 4, and August 12, 1914, announced its readiness to allow ten days of grace to German and Austrian merchant vessels already in British ports or which had entered or might enter subsequent to the outbreak of war, with certain exceptions, on condition that the British government should receive within three days notice that the treatment to be accorded British vessels in German or Austrian ports was not less favorable.[1] No such assurance being received from Germany the Order in Council did not go into effect as regards German merchant vessels.[2] German ships in English ports and English ships in German ports were therefore detained.[3] Assurance of reciprocity, however, having been received from the Austro-Hungarian government the Order in Council was applied in the case of Austro-Hungarian ships in British ports,[4] but it was not applied to Bulgaria or Turkey since neither had ratified the Convention. Egypt, which was of course not a party to the Convention and which did not declare war but whose territory was under British occupation and whose ports were by the British Prize Courts declared to be non-neutral, by a proclamation of August 6, offered nine days of grace to German merchant vessels which were in its ports.[5]

Sec. 194. Policy of Italy. Italy was not a party to the Convention but the Italian Merchant Marine code of 1877 (Art. 243) provided for days of grace in case Italy were a belligerent. However, by a decree of May 31, 1915,[6] the article was suspended and it was announced that all enemy merchant vessels in the territorial waters of the Kingdom and its Colonies at the beginning of hostilities should be placed under sequestration, although the Sixth Convention would be observed in so far as the laws of the Kingdom permitted. By a further decree of June 24, 1915,[7] it was announced that all such vessels would be confiscated as

[1] Higgins, article cited, p. 59. The governments of Canada and Australia promulgated orders in council, in substantially the same terms as those of the Imperial Order, offering days of grace. See, as to Canada, the case of the *Bellas* and as to Australia, the case of the *Turul*.

[2] See the statement of the Attorney-General before the Prize Court in the case of the *Chile*. It is said that notice of the British offer was not received in Berlin until the day after the expiration of the time limit. Huberich and King. *The Prize Code of the German Empire*, p. xxi.

[3] According to the London *Times* 225 enemy ships were found in British ports at the outbreak of the war or were "encountered" at sea and seized.

[4] See the case of the *Oriental* discussed below.

[5] See the cases of the *Gutenfels*, the *Achaia*, and the *Marquis Bacquehem* cited below.

[6] French text in Fauchille and Basdevant, *Jurispr. Ital.*, Annexe, p. vii.

[7] French text, *ibid.*, p. xiii.

an act of reprisal for unlawful acts of the enemy. The decree provided that whenever the enemy by bombardments, destruction of unarmed merchant vessels or other acts of hostility, contrary to the principles of international law, should injure the lives or property of Italian subjects enemy ships so sequestrated might be confiscated as good prize the proceeds of which might be applied for the indemnification of such subjects. The decision as to the liability to confiscation in such cases and the liquidation of the proceeds was devolved upon the Prize Commission. It was not, however, until April, 1919, that the Prize Commission began to issue decrees of confiscation; once begun it was continued, until 37 German vessels and 22 Austro-Hungarian vessels were condemned. The proceeds were applied to indemnify those who by the decree of June 24, 1915, were entitled to reparation for damages in violation of the law of nations.[1]

Sec. 195. Policy of Japan, Portugal, and Brazil. The government of Japan by a decree of August 23, 1914, allowed German merchant vessels in Japanese ports two weeks in which to leave. The Portuguese government on February 23, 1916, before the outbreak of the war between Germany and Portugal, requisitioned *jure angariæ* nearly all German vessels (the number was reported as being seventy-two) which were at the time in the ports of Portugal or Portuguese colonies—a measure which led Germany to declare war against Portugal on March 9, 1916.[2] Thereupon they were formally "captured" and put into the custody of the prize tribunal by which they were definitely condemned as good prize.[3] The government of Brazil appears to have adopted a procedure somewhat similar to that of Portugal. After having broken off diplomatic relations with Germany (April 11, 1917) the Brazilian Congress passed a law (June 1) authorizing the President to take possession of the 42 German vessels then in Brazilian ports, apparently not with the intention of confiscating them but rather as a measure of requisition for use in the coasting trade of Brazil. The Brazilian government now "revoked" its proclamation of neutrality issued at the outbreak of the war in Europe (but before declaring war upon Germany), whereupon the vessels were seized and a number of them

[1] See the case of the *Sigmaringen*, Fauchille et Basdevant, *Jurispr. All.*, p. 267, and the other cases, a full list of which may be found in Verzijl, *op. cit.*, pp. 636-637.

[2] For the facts see Basdevant, *La Réquisition des Navires Allemands*, 23 *Rev. Gén.*, p. 268; Ferrand, *Des Réquisitions*, pp. 341-343; and Garner, *op. cit.*, Vol. I, pp. 177-179.

[3] Verzijl, *op. cit.*, pp. 1222-23.

were leased to the French Government.[1] In reply to a protest from the German government the government of Brazil justified the seizure as a legitimate measure of reprisal against Germany for having illegally torpedoed certain Brazilian merchant vessels and ships of war.[2] Roumania also appears to have requisitioned enemy merchant vessels in her ports upon the outbreak of war, although unlike Brazil they were put into the custody of the Prize Court for condemnation.[3]

Sec. 196. Policy of Siam and China. Other States which did not offer days of grace were China, Siam, and the United States. Some fifteen German and Austro-Hungarian merchant vessels were in Chinese ports when on the 14th of August, 1917, China declared war on Germany and Austria-Hungary. They were put into the custody of the Prize Court and condemned on the ground that they were not entitled to the benefit of the Sixth Hague Convention since the purpose of that Convention as set out in the preamble was to insure the security of international commerce against the surprises of war and, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities.[4] The government of Siam followed the same procedure. No days of grace were offered to enemy merchant vessels in Siamese ports. They were accordingly seized and put into the custody of the Prize Court by which they were condemned on the ground that they were refugee ships which had been in Siamese ports more than two years and were not entitled to the benefit of the Sixth Hague Convention.[5]

Sec. 197. Policy of the United States and Cuba. When the United States declared war against Germany on April 6,

[1] As to the facts see 45 Clunet, p. 166.
[2] Verzijl, *op. cit.*, p. 630.
[3] Verzijl, *op. cit.*, p. 393.
[4] See, among others, the case of the Kaethe, *Judgments of the High Prize Court*, p. 1.
[5] Case of the *Samsen* and five other vessels. Text of the decision in 45 Clunet, p. 1316. See also the cases of the *Chantaboon*, the *Patriu* and others (46 Clunet, p. 428) in which the Prize Court of Siam condemned five lighters belonging to the North German Lloyd Steamship Co. on the ground that they were not *navires de commerce* within the meaning of the Sixth Hague Convention. Even if they could have been brought within the category of merchant vessels they would not have been entitled, said the Court, to the benefits of the Sixth Convention because the German government had by an official communication of March 30, 1917, to the Siamese government informed it that Germany did not regard the Eleventh convention as binding for the reason that it had not been ratified by all the belligerents in accordance with the solidarity Article No. 9. This contention, said the Court, would apply equally to the Sixth convention. Therefore, if Germany was unwilling to observe the latter convention she had

1917, and against Austria on December 12 there were nearly one hundred German and Austro-Hungarian merchant vessels in the ports of the country. They had taken refuge there upon the outbreak of the war in Europe, more than two years earlier. They were in a situation similar to those which were found in the ports of Brazil, Italy, Portugal, China, Siam, and other countries when war between them and Germany broke out. They were not therefore merchant vessels caught by the surprises of war in enemy ports while engaged in commercial operations, but were in reality refugee ships in neutral ports which subsequently became enemy ports. They had been free to leave American ports at any time since they entered, but for obvious reasons did not elect to do so. Under such circumstances, if days of grace had been offered when the United States became a belligerent the offer would probably not have been availed of. As in the case of the other countries mentioned above none were therefore offered. In one respect, however, the policy of the United States was different from that of Italy, Portugal, China, and Siam, namely, the ships were not put into the custody of the Prize Courts for condemnation. The policy of the United States was rather analogous to that of Brazil, that is, the ships were taken possession of by the executive in pursuance of legislative authorization. By a joint resolution of Congress approved May 12, 1917, the President was authorized to "take over to the United States the possession and title" of such vessels and to "operate, lease, charter and equip them in any service of the United States or in any commerce, foreign or coastwise." In accordance with this resolution the President directed that the possession and title to 87 German and Austro-Hungarian vessels be taken over through the United States Shipping Board (Executive Order, June 30, 1917). Nothing in the joint resolution or in the debates or in the order of the President contained any intimation as to what would be the final disposition of the vessels or upon what principle they were seized, although it was officially stated at the time that the action taken was not done with a view to confiscation but merely as a precautionary measure to prevent the ships from being destroyed or injured by their crews and to safeguard the right of the United States to requisition them in case of necessity.[1] As stated above, they were never submitted to

no right to demand of her enemies the observance of the former. See also Secs. 108-109, *supra*.

[1] *Official Bulletin* of the U. S., Dec. 31, 1917. As to the facts, see Hyde, *International Law*, Vol. II, p. 523, and my work cited, Vol. I, p. 167. In

the jurisdiction of the Prize Court and their final disposition was left to be determined by the treaty of peace. The Policy of Cuba, which declared war against Germany on April 7, 1917, was similar to that of the United States. No days of grace were offered and German ships in Cuban ports were seized by the Executive and, without being submitted to the jurisdiction of the Prize Court, were transferred to the United States.

Sec. 198. Vessels Excluded from the Benefit of the Sixth Convention. Not all enemy vessels found in port at the outbreak of the war were entitled to exemption from confiscation even when the Convention was applied. By its express terms (Art. 5) it does not apply to merchant vessels "whose build shows that they are intended for conversion into warships." The interpretation of this article came before the Prize Courts in several cases. In the case of the *Derflinger*,[1] a German merchant vessel which arrived at Port Said on August 2, 1914, and which was taken out to sea by the Egyptian authorities where she was captured by a British cruiser, the Prize Court held and the decision was affirmed by the Judicial Committee that assuming that the Sixth Hague Convention was operative, the vessel was not entitled to immunity from capture because her build showed that she was intended for conversion into a war ship. The Prize Court of Portugal in condemning the 72 German and Austro-Hungarian vessels seized in Portuguese ports appears to have based its decisions upon the fact that all the vessels were susceptible of being transformed into war ships, or auxiliary cruisers or were utilizable for the transportation of troops—a category which evidently embraces other craft than that contemplated by Article 5 of the Convention.[2] In the United States there was

the case of the *Gaelic Prince* (1923), the U. S. District Court stated that the seizure of German vessels in the ports of the United States in pursuance of the above mentioned joint resolution of Congress "vested title to the vessels in the United States" and that "Congress may provide and direct action for the seizure and condemnation of enemy vessels in the place of the customary prize proceedings." The decision was affirmed by the Supreme Court in 1926. *Littlejohn v. U. S.* (270 U. S. 215).

[1] IV, Lloyd, 336; II, Br. & Col. Pr. Cas., 36.

[2] See Verzijl, *op. cit.*, pp. 688-689, and the cases there cited, especially the *Commodore*, the *Naxos* and the *Santa Ursala*. Verzijl thinks that the denial of the immunity of the Convention in these cases could be justified only on the argument—"highly contestable, if not entirely false"—that the vessels were capable of being employed to serve warships as auxiliaries and that the possibility of transforming them into such auxiliaries was equivalent to the possibility of converting them into ships of war, in the strict sense of the word. Such an assimilation of auxiliaries to warships was, he rightly concludes, not permissible. Compare also Colombos, *op. cit.*, p. 141, who remarks that the test of susceptibility was wholly contrary to the spirit of the Convention.

some sentiment in favor of the confiscation of German ships found in American ports at the outbreak of the war and among the arguments put forward in favor of such a policy was that many of them had been constructed under contract with the German government with a view to their use as naval auxiliaries in the event of war; that they were furnished with gun platforms and steering gear below the water line and were manned by naval reserve crews who were on leave from the German government and subject to its orders in case of war. They fell therefore within the category of ships referred to in Article 5 of the Convention, which are not entitled to exemption from confiscation. But in answer to this argument it was pointed out that if such an interpretation were followed it would defeat the objects of the Convention because as Herr Kriege had observed at the Second Hague Conference, practically no ocean liners were being constructed today which are not in fact capable of being employed as naval auxiliaries in time of war.[1]

Several belligerent governments in their decrees relative to the policy they proposed to pursue in respect to the application of the Convention expressly excepted certain classes of vessels from the benefit of the immunity. Thus the British Orders in Council excepted cable ships, sea-going vessels designed to carry oil and ships whose tonnage exceeded 5,000 tons gross or whose speed was 14 knots or over. Likewise the French decree excepted not only ships "susceptible" of being converted into war vessels but also those employed in the public service, e.g. those transporting mails. On the other hand, the Italian government in ordering the confiscation of enemy merchant vessels found in Italian ports provided that an exception should be made of vessels whose owners possessed enemy nationality in the political sense but were Italian in the ethnic sense of the term, e.g. persons of Italian origin who were subjects of the Emperor of Austria. In such cases the Prize Commission was directed to suspend the distribution of the proceeds from the sale of the vessels and goods on them until the ministry should determine whether they should be released to the claimants.[2]

Sec. 199. Relation of the Sixth Convention to the Customary Law. In several cases the prize tribunals were called upon or took occasion to pass on the question whether enemy merchant vessels in port at the outbreak of war were entitled to

[1] See on this point my work cited, Vol. I, pp. 170-171; see also *Actes et Documents de la Deuxième Conférence*, p. 1033.

[2] Decree of June 24, 1916, Article 4.

immunity from capture under the customary law of nations independently of the Convention. During the discussion at the Second Hague Conference a good many delegates including those of the United States, Germany, and Russia expressed the opinion that the practice of according days of grace had been so long and generally observed by belligerents that it had acquired the force of a rule of customary law and one of the reasons why the delegation of the United States declined to sign the Convention was because it failed to recognize that the immunity had become a right and should not therefore be regarded as a matter of grace depending on the will of the belligerents.

Sec. 200. Views of the British Prize Courts. In the case of the *Gutenfels*,[1] the Prize Court for Egypt observed that days of grace for a longer or shorter period had been granted by most of the belligerents in the wars that have occurred during the last seventy years but it being impossible at the Second Hague Conference to agree upon an obligatory rule, the conference "ultimately adopted a formula which amounts to no more than a recommendation that belligerents should allow enemy ships to clear and reach a neutral port in safety." In the case of the *Marie Leonhardt*,[2] the claimants, asserting no rights under the Sixth Hague Convention, contended that at the time of the outbreak of the war "a custom had arisen of allowing to merchant vessels of belligerents found in enemy ports on the outbreak of a war a period of time in which they are free from capture and may withdraw from enemy waters." The allowance of such a *délai*, they argued, was a right the recognition of which was obligatory upon all civilized states. The seizure of the *Marie Leonhardt* was therefore a wrongful act and the Court was asked to rescind the original decree of detention (Oct. 1, 1914), whereby the seizure was declared to be valid. Sir Henry Duke adverting to this contention said the question was whether there was at the outbreak of the war a rule of international law whereby an enemy merchant ship then found in the port of a belligerent was entitled to depart freely from such port, either immediately or after a reasonable number of days of grace. Such an inquiry he said could not in the Prize Court be usefully carried beyond, in point of time, the decision in *Lindo v. Rodney* (2 Dougl. 614a) where Lord Mansfield stated concisely that such ships were to be detained to be confiscated as enemy property, in the absence of a

[1] I, Br. & Col. Pr. Cas., 112; X, Lloyd, 178.
[2] III, *ibid.*, p. 761.

reciprocal agreement to the contrary. The argument of council that the practice of allowing days of grace extending over a period of sixty years had established a custom or usage having the effect of law, in support of which the statements of eminent jurists had been cited as evidence of general, if not universal, recognition of this alleged right, he did not think well founded, nor did he think the text books relied upon bore out their contention.[1] Even if there were unanimity of opinion among the text writers it would still be necessary to inquire whether the days of grace offered were in the nature of concessions or recognitions of a pre-existing right. Then adverting to the opinions expressed at the Second Hague Conference on this point and the varying conduct of the belligerents at the outbreak of the war in 1914, he concluded:

"Giving all the weight I can give to the concessions made by belligerent Powers from 1854 to 1914, and the concurrence of numerous States in a desire to secure as a right under international law days of grace for enemy ships found in the ports of a belligerent at the outbreak of war, I find myself brought definitely to the conclusion that the law on this subject remained in 1914, and is now, as it was in the time of Lord Mansfield. Ships of the enemy in our ports at the declaration of war, or the outbreak of hostilities, are "detained in our ports, to be confiscated . . . if no reciprocal agreement is made."[2]

In the case of the *Blonde*, the *Hercules*, and the *Prosper*,[3] Sir Henry Duke reaffirmed his opinion in the case of the *Marie Leonhardt* that, independently of a reciprocal agreement, enemy merchant vessels in port at the outbreak of war were entitled to no right to days of grace; and that the law as laid down by Lord Mansfield was still the law of the country, namely that such vessels were subject to condemnation as lawful prize. Upon appeal[4] the Judicial Committee overruled Sir Henry Duke on the question of the applicability of the Sixth Hague Convention but it affirmed his view that in the absence of a reciprocal agreement there was no right to immunity from confiscation. On this point Lord Sumner said:

[1] Here he cited Hall, *International Law* (7th ed.), p. 477; Higgins, *The Hague Peace Conferences*, pp. 300-301, and Moore, *International Law Digest*, Vol. VII, p. 453, to show that no such universal custom had arisen.

[2] Commenting on this decision Verzijl (*op. cit.*, p. 644) remarks that Sir Henry in his reasoning failed to make a clear distinction between the refusal of a belligerent to accord days of grace to enemy ships and their subsequent confiscation by the Prize Court, in that even when the alleged right to days of grace was not recognized the Prize Court might exempt them from confiscation. See Sec. 227 below.

[3] X, Lloyd, 225; III, Br. & Col. Pr. Cas., 875.

[4] X, *ibid.*, 246; III, *ibid.*, p. 1031.

"It is true that in several instances during the nineteenth century belligerents mitigated the rigour of the rule and granted days of grace for the free departure of such vessels. The practice was certainly modern, but it was neither uniform nor universal, and on each occasion it rested with the belligerent to elect whether the rule recognised by the law of nations should be mitigated or not. It is not surprising that the negotiations of 1907 got no further than agreeing that permission to depart freely, within a time to be fixed by the Power entitled to capture, was a thing desirable indeed, but not obligatory."

Sec. 201. View of the German Prize Court. In the German case of the *Fenix,*[1] the claimants argued that the Sixth Hague Convention was merely declaratory of the customary practice according to which not only those ships which were already in a hostile port at the outbreak of war but also those which were *en route* to such a port were entitled to immunity from capture. That the Convention did not expressly refer to the latter class of ships, they asserted, was the result of a mistake in drafting. It was, they argued, clearly evident from the preamble that the Convention intended to confirm the existing practice and to protect merchant vessels bound for an enemy port. The Supreme Prize Court admitted that within certain limits this contention was true but declared that it in no way altered the fact that Germany had reserved her ratification of Article 3 which was intended to protect such vessels and consequently had lost the protection which it offered.

Sec. 202. View of the Belgian Prize Council. The Belgian Prize Council admitted that the Convention intended to "consecrate an already universally admitted rule of international maritime law according to which, with some exceptions, the immediate departure, or departure within a sufficient period, must be accorded to enemy merchant vessels," but declared that it would be absolutely contrary to the text to conclude that in no case could such vessels be confiscated; that the right of capture of private property at sea remained the general rule and that the object of the Convention was to mitigate it only in favor of vessels finding themselves in one or the other of the two exceptional cases mentioned in Article 2 and which must be interpreted strictly.[2]

Sec. 203. View of the Chinese Prize Court. The Chinese Prize Court interpreted the Sixth Convention as being declaratory

[1] I, *Entsch.*, 1; Fauchille et De Visscher, *Jurispr., All.*, p. 1; English trans. 10 *Amer. Jour.*, p. 909.

[2] The *Feronia*, text, 47, *Rev. de Droit Int.*, 271; The *Elbing*, *Hanau*, and *Tasmania*, text, *ibid.*, 277.

merely of the existing usage. In the case of the *Deike Rickmers*,[1] it said:

> "It is not contrary to the content or spirit of the Hague Convention that the applicant claims the protection of the said Convention, especially as the same only confirms the long established principles of international law which were duly observed by the belligerents in the Russo-Turkish war of 1853, the Austro-Prussian war of 1866, the Franco-German war of 1870, the Spanish-American war of 1898 and the Russo-Japanese war of 1904. According to international usage, ships found in enemy harbours at the outbreak of war are either allowed to depart or (are) detained or requisitioned on an understanding to pay indemnity after the war, and as the principle has hitherto been observed by all civilized nations, the point whether the Hague Convention of 1907 was signed or not, is immaterial."

The ship was condemned, however, on another ground, namely that the Convention was not designed to protect refugee ships such as those found in the ports of China were in fact.

Sec. 204. Is Permission to Leave Dependent upon the Issuance of a Proclamation? Is it incumbent upon a belligerent who in conformity with Articles 1 and 2 of the Sixth Convention intends to allow days of grace, to issue a public proclamation to this effect for the information of enemy merchant vessels in its ports? This question was considered by the Belgian Prize Council in the cases of certain German ships seized in the port of Antwerp some days after the outbreak of the war.[2] The Belgian government did not expressly announce by proclamation or otherwise its intention to accord days of grace but the military and port authorities for nearly four days took no action looking toward the seizure of the vessels, during which period they were free to leave the port. Discussing the obligation of Belgium under the Convention, the Prize Council pointed out that neither the text of the Convention nor the discussion of the matter at the Conference indicated that a belligerent was bound to make known by a notification or publication its intention to accord days of grace; consequently, this concession might result from the actual abstention for a number of days of the authorities from seizing the vessels. The Prize Council added that the German vessels were in fact free to leave at any time from 7 o'clock on the morning of August 3, 1914, the date of the expiration of the German ultimatum to Belgium, and 5 o'clock in the afternoon of August

[1] *Judgments of the High Prize Court of the Republic of China*, at p. 54. See also the case of the *Albenga*, *ibid.*, p. 34.

[2] See notably the cases of the *Elbing*, *Hanau*, *Tasmania*, *Gratia*, and *Feronia*, 47 *Rev. de Droit Int. et de Lég. Comp.*, pp. 271 ff.

6, when the vessels were formally captured. This *délai de faveur* was regarded as sufficient and consequently there had been no violation of the Convention on the part of Belgium.

II

What are "Merchant Vessels" in the Sense of the Sixth Hague Convention?

Sec. 205. Pleasure Yachts. British Interpretation. In the British case of the *Oriental*,[1] the Crown claimed the condemnation of a steam yacht belonging to a Hungarian subject, which had been seized at Cowes upon the outbreak of war between Great Britain and Austria-Hungary. The yacht had been, as a matter of reciprocity, allowed a certain number of days of grace to leave, but for some reason it did not avail of the permission accorded. Sir Samuel Evans held that although days of grace had been accorded, the vessel was not one in fact to which the Sixth Hague Convention applied. That Convention, he said, was intended to protect from capture only "merchant" vessels —*navires de commerce*—as appeared from the preamble where the object of the Convention was declared to be to insure the security as far as possible of the "safety of commerce," and not to establish the immunity of pleasure yachts. The *Oriental* was therefore condemned and ordered to be sold as lawful prize. Substantially the same question was involved in the case of the *Germania*,[2] a pleasure yacht belonging to Herr Gustaf Krupp von Bohlen, a German subject. The yacht had arrived at Cowes near the end of July, 1914, for the purpose of taking part in the annual regatta. On August 6, two days after the outbreak of war between Great Britain and Germany, the *Germania* was seized and a writ of prize issued. A "Chile" order of detention was made and subsequently the Crown applied for an order of condemnation of the vessel as a "droit of admiralty," on the ground that the yacht did not belong to the category of "merchant vessels" protected by the Sixth Hague Convention. The only difference between this case and that of the *Oriental* was that the latter had been offered days of grace in which to leave. The British government not having received information from the

[1] I, Lloyd, 355; I, Br. & Col. Pr. Cas., 575 n.
[2] IV, *ibid.*, 237; II, *ibid.*, 573.

German government as to its own policy, did not accord the same privilege to German vessels. Counsel for the claimants admitted that the *Germania* was not, strictly speaking, a merchant vessel but contended that it came within the "spirit" of the Hague Convention. Yachts, it was asserted, were not specifically mentioned in the Convention because it was never imagined that private property such as this found in an enemy port at the outbreak of war would be condemned. Enemy merchant vessels were entitled by the comity of nations to days of grace and, *a fortiori*, a racing yacht which had really come to England as a guest should have been given an opportunity to leave. Adverting to the case of the *Oriental*, counsel argued that the Hungarian yacht had been condemned not because it did not belong to the category of vessels protected by the Hague Convention but because it had failed to avail of the permission to leave which had been offered it—a contention which was hardly deducible from the language used by Sir Samuel Evans in his judgment. He condemned the *Germania* for the same reason that he had condemned the *Oriental*, namely, that it was not a "merchant vessel" such as the Convention intended to protect against capture. The plea of the claimants that yachts, nevertheless, came within the "spirit" of the Convention he refused to consider. The liability of enemy property to capture must be determined according to the "ordinary law" and not with reference to any supposed "spirit" of international conventions. Upon appeal the decision was affirmed by the Privy Council.[1] Here counsel for the appellants, who in the Prize Court had admitted that yachts were merchant vessels only within the "spirit" of the Convention, argued that the category of *navires de commerce* referred to in Article 2 embraced all vessels which could not be described as *navires d'état*, and therefore it included yachts. They called attention to the view of German authorities on Prize Law that the term "merchant vessels" includes all ships not belonging to the state, even though they are used for pleasure only. The Privy Council, however, held that there was nothing in the context of Article 2 or in the proceedings of the International Naval Conference of 1909, to which counsel for the appellants had referred, which justified such a contention. Their Lordships' conclusion was that the Convention intended to protect only *commercial* vessels properly so called and not all private vessels which could not be comprehended under the term *navires d'état*. The lan-

[1] IV, Lloyd, 263; II, Br. & Col. Pr. Cas., 365.

guage of the preamble made it clear, they said, that the purpose of the Convention was the protection of operations of a commercial character, and the immunity therefore covered only vessels which were employed in such operations. Aside from the Convention, there was no principle of prize law which exempted racing yachts from the ordinary rule that enemy property seized in port at the outbreak of war, is liable to confiscation and condemnation. The decision has been criticized as unduly strict and technical and there is some ground for the view that the authors of the Convention did not intend to exclude from its benefits any vessels except warships; in short, the category of *navires de commerce* was meant to include all vessels except *les bâtiments de guerre*.[1]

Sec. 206. The Same. View of the French Prize Council. The French Prize Council in the case of the *Tolna*,[2] which involved the status of an Austrian pleasure yacht seized in a French port at the outbreak of war, adopted the view of the English Prize Court that the expression *navires de commerce* as used in the Sixth Hague Convention could not, especially in view of the interpretative explanation contained in a letter of the minister of marine, be construed to embrace pleasure yachts such as the *Tolna*. The immunity contemplated by the Convention, said the Prize Commission, was an exceptional disposition and must be strictly interpreted. It applied only to "ships of commerce" found in enemy ports at the outbreak of hostilities. The *Tolna* was not therefore entitled to days of grace and must be confiscated.

Sec. 207. The Same. View of the German Prize Court. The question as to whether a pleasure yacht was a "merchant vessel" in the sense of the German prize ordinance was passed upon by the Supreme Prize Court of Germany in the case of the *Primavera*,[3] a Belgian sailing yacht which was captured by the Germans in the port of Antwerp upon their occupation of that city in October, 1914. The yacht had formerly belonged to an American who had several times traversed the Atlantic Ocean in it, but since its acquisition by the Belgian owner it had been used mainly for pleasure trips to Norway. The claimant contended that the yacht could not be regarded as a merchant vessel—*navire de commerce*—in the sense of the German prize ordi-

[1] Compare Higgins, *Br. Yr. Book of Int. Law*, 1922-23, p. 77, who thinks Fromageot's report bears out this view.
[2] 27 *Rev. Gén.* (1920), *Jurispr.*, 90.
[3] I, *Entsch.*, 194; Fauchille and De Visscher, *Jurispr. All.*, p. 146.

nance, and, in consequence, the Prize Court had no jurisdiction to condemn it. The Prize Court at Hamburg, however, condemned it, and upon appeal to the Supreme Prize Court at Berlin, the decision was affirmed. Before the supreme court the appellant argued, first, that the *Primavera* not having been captured at sea but in the interior of Belgium the capture was an act of land warfare over which the Prize Court had no jurisdiction; second, that it was not a sea-going vessel (*navire de mer*) but was used by the appellant entirely upon the canals of Holland; and, third, that it was not a "merchant vessel," and therefore the capture did not fall within the jurisdiction of the Prize Court, either under the prize ordinance or under the general rules of international law. The first contention had already been disposed of by The Court in the case of the *Primula*,[1] where it was held that the prize jurisdiction applied to captures of ships made by the troops or port authorities in interior ports and this decision was reaffirmed in the present case. The second argument that the vessel was not a sea-going ship, The Court declared was refuted by the declaration of the appellant that it had on several occasions crossed the ocean and had made voyages to Norway. It possessed, therefore, the character of a sea-going vessel and it was immaterial that the yacht had been used by the present owner only for pleasure trips. As such the law of maritime war, and not that of land warfare (Art. 53 of the Fourth Hague Convention relative to the laws and customs of war on land), applied to its capture. The benefit of the Sixth Hague Convention could not be invoked since that convention would protect it only in case it were found in a *German* port at the outbreak of war. The third argument, that the *Primavera* was not a merchant vessel in the sense of the prize ordinance and therefore not a subject of prize jurisdiction, the Court rejected and laid down the rule that all vessels which are not the property of the state must be considered as merchant vessels, without regard to their character or the use to which they are put. This resulted not only from the language of the German prize ordinance but also from the discussions of the subject at the London naval conference and from the express understanding regarding the meaning of the term *navires de commerce* as embodied in M. Renault's report accompanying the Declaration of London. Nevertheless, the Court admitted that the term *navire de com-*

[1] I, *Entsch.*, p. 17; Fauchille et De Visscher, *Jurispr. All.*, p. 13. See also Sec. 146, *supra*.

merce was used in two senses: first, in the sense of the prize ordinance and the Declaration of London where it was intended to embrace all non-state owned vessels, and, second, in the stricter sense of including only private vessels employed in commerce properly speaking. It was this latter interpretation which the appellant sought to have adopted. The Court pointed out in support of its thesis that if only those vessels which are used for commercial purposes in the strict sense of the word may be regarded as "merchant vessels" it would not have been necessary to except from the right of capture hospital ships, fishing boats, vessels employed on religious missions, etc., because according to this contention the law of maritime capture would not apply to them and they would not be subject to it even if the exception had not been expressly made.

Sec. 208. Are Tugs and Lighters "Merchant Vessels"? German Interpretation. In the case of the *Assistent* and *Undine*[1] the German Supreme Prize Court was called upon to decide whether certain Russian wooden tug boats, ferry boats, and lighters, seized at Libau, were "merchant ships" (*Kauffahrteischiffen, navires de commerce*) within the meaning of the German prize code and whether therefore the Prize Court had jurisdiction to pass upon their liability to condemnation. It does not appear that their immunity from capture under the Hague Convention was invoked by the claimants. The lighters were employed for loading and unloading ocean going steamers and the tugs for moving the lighters and ferry boats. The Prize Court at Hamburg held that considering the small size and tonnage of the craft, they were not merchant vessels although privately owned and consequently the Prize Court had no jurisdiction. Upon appeal by the Imperial Commissioner the Supreme Prize Court affirmed the decision of the lower court and held that while as a general rule all vessels belonging to private individuals must be regarded as merchant vessels within the sense of the German prize ordinance, the rule was not without exception. The term "merchant vessel," said the Court, implies the idea of a ship which by its structure and build has a certain importance. Tugs and lighters which are employed merely to maintain communication between the shore and ships anchored in port and which by reason of their build and dimensions are never designated as "ships" by mariners cannot be regarded as "merchant vessels."

[1] I, *Entsch.*, 150; Fauchille et De Visscher, *Jurispr. All.*, p. 116. See also Secs. 60, 61, *supra*.

This was recognized by the prize ordinance in its provisions relative to the carrying of flags and identification papers. For these and other reasons it was little probable that the prize code ever intended that the Prize Court should have jurisdiction of cases of capture of such craft as tugs and lighters. Their capture was therefore governed not by the law of maritime prize but rather by the laws of land warfare, notably by Article 53 of the Fourth Hague Convention of 1907.

In the case of the *Comte de Smet de Naeyer*,[1] the German Supreme Prize Court overruling the Prize Court at Hamburg, again affirmed the rule that according to the German prize ordinance, which it declared was in accord with the Declaration of London, merchant vessels include all ships not belonging to the state and the vessel which was the object of proceedings in this case not coming within the exception referred to above in the case of the *Assistent* and *Undine* was condemned as good prize. The vessel was owned by a company which conducted a school of navigation and which had occasionally received subventions from the state. This fact and the further circumstance that the school was under the surveillance of the state did not, however, give the vessel the character of a public ship. Nor did the fact that the vessel had for some years ceased to make sea voyages and remained at anchor in port, deprive it of its character as a sea-going vessel since it could easily be retransformed into a transport ship.[2]

Sec. 209. English and German Interpretation Compared. It will be recalled that in the English case of the *Germania* counsel for the appellant argued before the Privy Council that the category of "merchant vessels" embraced all vessels not belonging to the state and they relied upon German authority and jurisprudence and upon the discussions at the International Naval Conference in support of their contention but the Privy Council rejected the contention and held that not all privately owned ships were merchant vessels and that among these were yachts. The decision of the German Prize Court in the case of the *Primavera* that yachts are merchant vessels was therefore contrary to the English decision, although in both cases the decision led to the same result: the condemnation of the yachts. In the English case, however, the Prize Court was interpreting the Sixth Hague Convention. The question involved was whether pleasure yachts belonged to the category of vessels which the Convention

[1] I, *ibid.*, 209; *ibid.*, 159.
[2] See further, as to these German cases, Secs. 60, 190, *supra*.

intended to protect against capture. In the case of the *Primavera* the German Prize Court was called upon to interpret not the Hague Convention, which was not applicable, but the German prize ordinance. According to this ordinance all vessels not the property of the state fall within the category of merchant vessels and the *Primavera* being of this class and not coming within the protection of the Hague Convention, since it was not captured in a German port, was confiscated. The two decisions so far as they relate to the status of yachts are not necessarily contradictory since a yacht may well be a merchant vessel in the sense of the German prize ordinance and yet not be in the sense of the Hague Convention. As to the meaning of the term "merchant vessel" (*navire de commerce*) as used in the Hague Convention and the Declaration of London, however, the opinions of the British and German Prize Courts are not in accord. The former apparently restricts the term to vessels which are employed strictly for purposes of commerce and transportation, that is, their character or use is the test; the latter extends it to include all vessels not belonging to the state, that is, ownership is the test.

III

Interpretation of the Word "Port" in the Sixth Convention

Sec. 210. British Interpretation. The meaning of Article 1 relative to days of grace for merchant vessels "in an enemy port" or which "have entered a port belonging to the enemy" was a subject of controversy and of interpretation by the Prize Courts in a number of cases. The specific questions raised were: what is a "port" and what are the "high seas" in the sense of the Convention? In the case of the *Möwe*,[1] the British Prize Court held that a German merchant vessel captured at a place in the Firth of Forth which was not within the limits of a "port" in the usual commercial sense but was within the limits of the "port" of Leith for customs purposes was not protected by the Sixth Convention. The word "port" as used in the Convention did not mean, Sir Samuel Evans said, a fiscal port but must be construed in its usual popular or commercial sense as a place

[1] II, Lloyd, 70; I, Br. & Col. Pr. Cas., 60.

where ships are in the habit of coming for the purpose of loading or unloading their cargoes. The case of the *Möwe* was, therefore, that of a vessel not in port within the meaning of Article 1 but of one "encountered on the high seas" within the meaning of Article 3 and since Germany had not ratified the latter Article the ship was not entitled to the immunity which it provided. In reply to the alternative argument of the claimants that the vessel was captured, if not in port, in "territorial waters" and therefore not on the high seas, Sir Samuel said he would assume that she was taken in territorial waters though he considered that matter immaterial, since the Convention did not refer to "territorial waters." A vessel might, he said, be in territorial waters for scores of miles and might pass numerous ports without any intention of entering any of them, in which case it would be idle to say that on this account it would be immune from capture. He pointed out that where the Hague Conventions intended to deal with territorial waters as distinguished from ports they were expressly referred to as *les eaux territoriales* (e.g. the Twelfth and Thirteenth Conventions). In answer to the contention that the ship was not liable to condemnation because she was not captured on the "high seas" he pointed out that the words "encountered on the high seas" in Article 3 were not an accurate rendering of the authoritative French *rencontrés en mer*. Where the Conventions were intended to cover acts done on the "high seas" the phrase *en pleine mer* was employed. The French words *rencontrés en mer* were therefore exactly applicable to this case.

The Judicial Committee in the case of the *Belgia*[1] adopted the same restrictive interpretation. The *Belgia* was a German ship which on the afternoon of August 4, 1914, before the outbreak of war between Great Britain and Germany, attempted to enter the port of Newport but was stopped and ordered to anchor at a point alleged to be within the fiscal port but at some distance from the docks in an open roadstead where cargoes were never discharged or unloaded. This was not a "port" in the ordinary mercantile sense, that is, a place where ships load and unload, nor a "port" within the meaning of the Sixth Convention. It was not considered necessary to determine whether the *Belgia*, as alleged, was within the fiscal port of Newport, since in the opinion of their Lordships Articles 1 and 2 of the Convention did not apply to vessels merely within fiscal ports. "Those articles," said Lord Sumner, "are limited to merchant ships, and refer to

[1] IV, Lloyd, 134; II, Br. & Col. Pr. Cas., 32.

commercial transactions, not to fiscal regulations. The word port is used not only in the collocation 'enemy port,' but of 'a port of destination' and 'a port of departure'—well recognized terms in the language of commerce. To extend the benefit of Articles 1 and 2 of the Sixth Convention to vessels within a fiscal port would be not only to interpolate a word not used in the articles, but to introduce a new test not relevant to the subject-matter and involving different considerations. That the scope of Articles 1 and 2 is 'commercial,' and not 'fiscal,' is further confirmed by the language of the preamble of the Convention. The parties to the Convention are not concerned with the fiscal regulations in any particular country, but anxious to insure the security of international commerce against the surprises of war, and to protect, as far as possible, operations undertaken in good faith and in process of being carried out before the outbreak of hostilities."

A somewhat similar case was that of the *Erymanthos*[1] decided by the commercial court of Malta, in prize. This was a German merchant vessel which arrived off Malta in ignorance of the outbreak of war and was not allowed to enter but was ordered to anchorage in St. Paul's bay and while on her way was seized as prize. The Court being called on to decide whether the capture was made "in port" or, while "entering port" or whether she was "encountered at sea," held that the capture "really took place at sea in territorial waters between the grand harbour and St. Paul's Bay, although the material capture was, in its final stages, carried out . . . at St. Paul's Bay." The Court added, however, that it would have been immaterial even if the capture had taken place in St. Paul's Bay, this on the authority of Sir Samuel Evans' decision in the *Möwe* that the word "port" in the Hague Convention must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of loading or unloading, embarking or disembarking. St. Paul's Bay was not a "port" in that sense. It was a place of anchorage for examination purposes at a distance of some miles from the Grand Harbour and there were no other ports in Malta, with two exceptions, within the meaning attributed to the word by Sir Samuel. The Court of Malta said it concurred fully with Sir Samuel and considered that his interpretation was "the only possible interpretation of the word 'port' used in the Convention."

[1] I, Br. & Col. Pr. Cas., 339. See also Secs. 222, 233, *infra*.

Sec. 211. The *Bona fide* German Interpretation. The German Prize Court was called upon to decide the meaning of the word "port" in the case of the *Perus*,[1] a Russian vessel which had been seized on the 26th of August, 1914, by a German torpedo boat not far from the mouth of the Elbe in the environs of Hamburg and taken immediately into the port of Hamburg. The claimants argued inter alia, that at the time of the capture the *Perus* was already in the Elbe and was in the act of "entering port" and was therefore exempt from confiscation under the terms of Article 1 of the new Hague Convention. They called attention to the fact that in several more recent wars, notably the Chinese war, the Franco-German war of 1870, and the Spanish-American war, days of grace had been accorded not only to enemy merchant vessels actually in port at the outbreak of war but equally to those which were proceeding *bona fide* to an enemy port. The Hague Conference intended to confirm this practice, as the preamble clearly indicated, and if through an inadvertence in drafting the latter class of vessels was not expressly provided for, the manifest object of the Convention should not be defeated by a restrictive interpretation. The Prize Court admitted that this interpretation might in a certain measure be considered as exact, but the fact existed none the less that Germany had made reservations to the ratification of Article 3 relative to vessels encountered at sea and that in consequence such vessels were not entitled to the benefit of that article, it being applicable only to ships already in port or which "entered" after the outbreak of war. It would be arbitrary to hold, the Court added, that a vessel which is bound to a hostile port is in the same situation as one which has already entered the port. Adverting to the French text of the Convention, the Court observed that the words *entrant dans un port* signified simply *in einen Hafen einlaufen* and there was no reason why these words should be given an interpretation more extended than the text warranted. Even under this strict interpretation ships approaching *bona fide*, an enemy port do not lose the benefit of the Convention, because if they are not protected by Article 1 they come under the protection of Article 2. But those in the latter category cannot be placed in the first. The expressed desire of Germany to see the granting of days of grace made obligatory had nothing to do with the question of what ships must be considered as "at sea"

[1] Prize Court, 1 Decision in the November Sessions, 43, 1; English translation, 10 *Amer. Journ. Int. Law*, 96.

and what must be considered as "entering port." The proceedings of the Hague Conference on this question, said the Court, showed that this interpretation was in accord with the view of the authors of the text.[1] It resulted therefore indubitably that Article 1 must be interpreted still more strictly than the lower Prize Court had done, in the sense that it applied only to ships which without having knowledge of the existence of hostilities had really entered or were arriving in an enemy port. So long as the ship is outside a port, properly speaking, even though it is in the immediate environs, it is not protected by Article 1; it must, on the contrary, be considered as "at sea" and subject to capture in view of the non-ratification by Germany of Article 3. Finally, the Court added, this view was in accordance with the strict interpretation of the British Prize Court in the case of the *Möwe*.

A somewhat similar case decided by the German Supreme Prize Court was that of the *Primula*,[2] which was a Russian merchant vessel seized by a German warship in the river Trave between Lübeck and Travemünde at the moment it was leaving the port of Lübeck. The Court held that it must be considered as having been seized, not in port but at sea and in consequence of the German reservations to Article 3 of the Sixth Convention it was not entitled to the benefits thereof. Again the Court reaffirmed its interpretation in the case of the *Fenix* that a vessel captured outside a port, even in its immediate environs, was not protected by Article 1. This case differed from that of the *Fenix* only in the fact that while the *Fenix* was entering port the *Primula* was leaving a port. But this difference, the Court held, did not affect the question of principle involved. It could not be admitted that some 20 kilometres of distance on the river between Lübeck and Travemünde must be considered as constituting a "port" in the proper sense of the word and the fact that these waters were subject to police jurisdiction of the port authorities did not make them a port.

Sec. 212. The Same. French Interpretation. In the case of the *Walküre*,[3] the French Prize Council and the Council of State, upon appeal, held that a German merchant vessel which had been seized at the outbreak of the war in the harbor of

[1] The Court here cited Niemeyer, *Urkundenbuch Zum See—Kriegsrecht*, p. 473.
[2] I, Entsch., 17; Fauchille et De Visscher, *Jurispr. All.*, 13. See also Sec. 207, *supra*.
[3] Fauchille, *Jurispr. Franc.*, p. 303.

Makatea, at a place called Port Temao, in the French colony of Polynesia, could not be considered as having been found "in port" or in a place assimilable to a port, but was encountered at sea, and was not therefore entitled to the benefit of Articles 1 and 2 of the Sixth Hague Convention. The seizure of the vessel was made near the approach to an island or a place where according to the map the coast offered no cover for ships and where they were obliged, in order to trans-ship, to motor to buoys anchored at great depth and distant 300 metres at least from the shore.

IV

Vessels Entering Enemy Ports in Ignorance of the Outbreak of Hostilities

Sec. 213. Convention No Application to Vessels to Which Entrance Is Refused. In Article 1 of the Sixth Hague Convention the desire is expressed that a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy, while still ignorant of the outbreak of hostilities should be allowed days of grace within which to depart freely. This provision was strictly interpreted by the British Prize Courts. As already stated the commercial court of Malta, in the case of the *Erymanthos,*[1] interpreted the clause to mean that only ships which actually succeed in entering port while still ignorant of the outbreak of hostilities were exempt from confiscation—that is those which are allowed to enter—and not those which while desirous of entering are refused permission to do so.

Sec. 214. Presumption of Knowledge. Possession of Wireless Apparatus. In the case of the *Gutenfels No. 2,*[2] the Prize Court for Egypt held that a German vessel fitted with wireless telegraphic apparatus and which did not reach Port Said until about seventeen hours after the outbreak of war between Great Britain and Germany must be presumed to have entered the port with knowledge of the existence of war. In view of the great development of wireless telegraphy in recent years, said Judge Cator, and the extended use to which it has been put for the dissemination of news at sea, the only safe rule upon which a

[1] I, Br. & Col. Pr. Cas. 339. Sec. 210, *supra.*
[2] II, Br. & Col. Pr. Cas., 136.

Prize Court could act was to assume that an enemy ship fitted with wireless apparatus receives from its government, either directly or by transmission from other ships, prompt news of the outbreak of hostilities between its own and any other country. After some hesitation, however, he said he had come to the conclusion that this presumption was open to rebuttal by the production of proof to the contrary and in this case the onus had been freely discharged by the ship. A decree of detention until the end of the war, with a declaration that the vessel must then be restored or her value paid to the owners, was issued. Upon appeal, the Judicial Committee substituted a "Chile order" in lieu of the order for detention and restoration but it does not appear that it took a different view as to the ignorance of the master in entering the port.[1]

The Cape of Good Hope provincial division of the supreme court sitting in prize issued decrees of detention rather than of condemnation against two German vessels whose masters asserted that they entered the port of Table Bay in ignorance of the existence of war. The truth of their statements was accepted in view of the fact that neither vessel was equipped with a wireless telegraphic outfit.[2] But the same court confiscated the German steamer *Birkenfels*,[3] which entered the same port after the outbreak of war in pretended ignorance of the existence of hostilities, but which had on board a wireless telegraph installation which functioned regularly. Following the decision in the case of the *Gutenfels No. 2* the Court laid down the rule that vessels fitted with wireless intallations must be presumed when entering port after the outbreak of war to have had knowledge of the existence of war and that the onus of proving the contrary rests upon the ship when, as in this case, the installation was in good working order throughout the voyage and there were a number of wireless stations, neutral and German, with which the ship could have communicated, it was natural that the *Birkenfels* must have been aware of the existence of the war. The onus of satisfying the Court to the contrary not having been discharged, the vessel was condemned.

Sec. 215. What Constitutes Ignorance of Hostilities? In the case of the *Marquis Bacquehem*,[4] the Prize Court for Egypt

[1] IV, Lloyd, 336; II, Br. & Col. Pr. Cas., 36.
[2] The *Hamm* and *Apolda* No. 2, Cases Decided in the Prize Courts of South Africa, p. 15. To the same effect, see the *Bismarck No. 4* (*ibid.*, p. 27).
[3] *Ibid.*, p. 19.
[4] I, Br. & Col. Pr. Cas., 130.

refused to condemn an Austro-Hungarian vessel which after having been stopped in the Red Sea on August 17, 1914, by an English warship and informed that a state of war existed between Great Britain and Austria-Hungary, was allowed to continue and entered the port of Suez in the belief that it would be treated as a neutral port. She was subsequently taken out to sea by the Egyptian authorities and handed over to an English warship which brought her to Alexandria and put her in the custody of the Prize Court. The case was distinguishable from those of the somewhat similar cases of the *Gutenfels* and the *Bärenfels* [1] in that she was aware of the existence of hostilities when she entered port, whereas the latter vessels were not. Strictly speaking, therefore, she was not entitled to the benefit of Article 2 of the Convention. But the Court held that a British Prize Court ought to give effect to the object of the Hague Conventions and should interpret the rules of international law in a broad spirit, and since the vessel had derived her information of the existence of hostilities from a British cruiser, which had allowed her to proceed, she could not be confiscated but only detained and restored to her owners at the end of the war. Judge Cator said,

"On that point I have no doubt, but I find it hard to decide whether we should confiscate the ship or only order her detention. For although it is true that after being warned the *Marquis Bacquehem* might have run for a neutral port, it certainly does seem hard that she should be in a worse plight because the *Duke of Edinburgh* (an English warship) allowed her to proceed instead of taking her before a Prize Court, especially as this permission seems to have been given in the belief that the ship was entitled to consideration in consequence of her ignorance that war had broken out. Moreover, no stipulation was made that she should go to a neutral port, and she may have been encouraged in the belief that she could enter Suez in security. On the whole, I think that we should only order detention." [2]

Judge Grain concurred in the decision. After adverting to the failure of the *Duke of Edinburgh*, under a misapprehension, to capture the *Marquis Bacquehem* when she had a right to do so, he said, "The point which remains is, are we in consequence of this incident to consider that this vessel has lost the relief granted under the Hague Convention? That is to say, does she become a vessel entering port with knowledge of war on account of the knowledge which she has received from H.M.S. *Duke of Edin-*

[1] I, Br. & Col. Pr. Cas., 102, 122.
[2] As to Judge Cator's observations regarding the duty of the Court to give effect to the Hague Conventions, see Sec. 109, *infra*.

burgh? I am of opinion it would not be just to take advantage of this incident to make out a case of confiscation against her."

But upon appeal, the Judicial Committee [1] reversed this liberal decision and condemned the vessel on the ground that she was not in a belligerent port at the outbreak of war, nor did she enter such a port while ignorant of the existence of hostilities, nor was she captured on the high seas while ignorant of such hostilities. The reasoning of the Prize Court, said their Lordships, was not "in accordance with any principle of law" and could not be accepted. The commander of the *Duke of Edinburgh* acted under a misapprehension that some period of grace had been allowed and accordingly refrained from capturing her. His entry in the log book of the *Marquis Bacquehem* that she had been boarded and allowed to proceed could not be regarded as a sort of license to proceed without any risk of capture but was a mere memorandum of the fact of visit and search. Indeed, their Lordships concluded, if the commander had been truthfully informed of the facts of the case he would have captured the vessel on the simple ground that she entered with full knowledge of the existence of hostilities an enemy port where in the circumstances she was not entitled to protection or immunity under any international convention.

V

Treatment of Enemy Vessels Entering and Remaining for Purposes of Refuge in Neutral Ports Which Subsequently Became Belligerent Ports

Sec. 216. Interpretation of the British Prize Court. In a number of cases the Prize Courts were called upon to determine whether the protection of Articles 1 and 2 of the Sixth Convention applied to vessels which were not actually caught in enemy ports at the outbreak of the war but which entered them at a time when they were neutral, for the purpose of seeking refuge against capture.

In the case of the *Belgia*,[2] a German vessel which attempted to enter a British port some hours before the outbreak of war between Great Britain and Germany, the British Prize Court

[1] V, Lloyd, 79; II Br. & Col. Pr. Cas. 58.
[2] IV, Lloyd, 117; I. Br. & Col. Pr. Cas., 303. See also Sec. 210, *supra*.

expressed "grave doubt" whether the Sixth Convention was intended to protect such vessels. The captain contended that his purpose in endeavoring to enter the port was to obtain a supply of coal. The Court refused to believe his story (since in fact he had an ample supply) and declared that his real purpose was to escape possible capture by the cruisers of France, between which power and Germany war had already broken out, and also to get instructions from the German government.

Sir Samuel Evans passed definitely on the question in the case of the *Prinz Adalbert* [1] and the *Kronprinzessin Cecilie*,[2] two German vessels which entered the port of Falmouth on the morning of August 4, 1914, before the outbreak of war between Great Britain and Germany, but after the master had received a wireless message that war had already broken out between Germany and France. Both were condemned on the ground that the Sixth Convention did not protect vessels entering port under such circumstances. Adverting to the preamble to the Convention whose object is stated to be the desire to "insure the security of international commerce against the surprises of war" and to "protect as far as possible operations taken in good faith, and in process of being carried out before the outbreak of hostilities," Sir Samuel observed that these vessels were not in the port of Falmouth "in pursuance of any commercial undertaking at all"; and that the object of the master in taking them in was not to engage in commerce but was for a totally different purpose, which was not contemplated by the powers when they agreed upon this provision of the Hague Convention. The vessels were therefore condemned as good prize. Upon appeal to the Judicial Committee a "Chile order" (detention) was substituted for the decree of condemnation, following the precedent in the case of the *Gutenfels*.[3] The Judicial Committee thought the effect upon Article 1 and 2 of the preamble to the Convention was a point which admitted of "considerable doubt" and it was a question which they did not propose to decide at that time. By the substitution of

[1] IV, *ibid.*, 360; II, *ibid.*, 70.
[2] IV, *ibid.*, 360; III, *ibid.*, 363.
[3] This decision is criticized by Mr. C. N. Gregory (13 *American Journal of Int. Law*, 91) on the ground that a vessel on a commercial voyage which enters a port to seek shelter against capture might well be treated in the same way as one which enters to escape a violent storm. This criticism, if restricted to the judgment of the Prize Court which condemned the ships, contains an element of justice, but since the Judicial Committee overruled the Prize Court and substituted an order of detention it is hard to see wherein lies the weight of the criticism. It is not clear what other decision the Judicial Committee could have reached without affirming the judgment of Sir Samuel Evans.

a "Chile order" the rights of the Crown would be preserved intact for decision when the war was over and the views of the German government as to the true construction of the Convention would be known. The question was never definitely decided by the Privy Council, and the final disposition of the vessels was left to the treaty of peace.

Sec. 217. Status of Enemy Merchant Vessels in Egyptian Ports. The question of the applicability of the Convention to vessels taking refuge in neutral ports under the circumstances explained above assumed great importance by reason of the entrance of large numbers of German ships, in particular, into the territorial waters of Egypt, the Suez Canal, the ports of the United States, Brazil, China, Siam, and other countries which were neutral for some time after the outbreak of war in Europe but which ultimately became belligerents.

As regards those entering Egyptian waters the question involved not only the application of the Hague Convention but also the interpretation of the Suez Canal Convention of 1888 relative to the international status of Egypt and of certain Egyptian ports.

The Prize Court for Egypt held that while the Suez Canal Convention established the right of free passage through the canal for all ships without distinction in time of war, as in time of peace, it did not give a right of asylum to belligerent merchant vessels in the ports of the canal and consequently such vessels entering the canal not for the purpose of passing through it but for the purpose of refuge were liable to seizure.[1] This view was affirmed by the Judicial Committee of the Privy Council.[2] The Prize Courts also held that Egyptian ports prior to the establishment of the British protectorate, in December, 1914, and before Turkey entered the war, must be regarded as enemy ports *vis à vis* Germany and Austria-Hungary, in the sense of the Sixth Hague Convention.[3] While the Prize Court for Egypt held that German merchant vessels found in such ports were entitled to the benefit of the Sixth Hague Convention and could therefore only be detained until the end of the war when they must be restored,[4] the Privy Council overruled the Prize Court to the extent of adjourning a final decision, not because it enter-

[1] See especially the case of the *Gutenfels*, I, Br. & Col. Pr. Cas., 102.
[2] The *Gutenfels*, *Bärenfels*, and the *Derflinger;* compare also the *Pindos*, *Helgoland* and *Rostock*.
[3] See notably the cases of the *Gutenfels*, the *Achaia* and the *Marquis Bacquehem*.
[4] The *Gutenfels* and the *Bärenfels*.

tained a different view as to the applicability of the Convention but because of the absence of knowledge as to how Germany would interpret the Convention.[1]

Sec. 218. Decisions of the Chinese Prize Court. As to enemy merchant vessels entering neutral ports for the purpose of seeking asylum and remaining there until those ports became belligerent in consequence of a declaration of war, the Chinese Prize Court followed the decisions of the British Prize Court in the cases of the *Prinz Adalbert* and *Kronprinzessin Cecilie* and held that they were not protected by the Sixth Hague Convention. Adverting to the preamble of the Convention, the Court said: "It is evident that these provisions are applicable only to merchant ships *bona fide* engaged in trade, and that merchant ships which have ceased trading and have taken refuge in a port to avoid capture by belligerents cannot claim protection under the said Convention." Twelve German and Austro-Hungarian merchant vessels seized in Chinese ports under these circumstances were therefore condemned as good prize.[2]

Sec. 219. Action of the Prize Court of Siam. The Prize Court of Siam followed the decisions of the Chinese Prize Court and condemned a number of German merchant vessels and lighters which had sought asylum in the port of Bangkok at the outbreak of the war in Europe and which were seized when Siam later entered the war. The Prize Court, referring to the preamble of the Sixth Convention, said: "it is clear that this Convention was not intended to protect all ships of commerce without distinction but only those which at the outbreak of hostilities were surprised in an enemy port while they were engaged in *bona fide* commercial operations." [3]

Sec. 220. Policy of Other Countries. Enemy merchant vessels seized in similar circumstances in the ports of the United States, Brazil, Cuba, and other American ports were never placed in the custody of the Prize Courts and consequently they did not have an opportunity to pass on the question as to whether

[1] In the case of the *Athena* and others (Fauchille, *Jurispr. Franc.*, p. 458) the French Prize Council held that certain German merchant vessels which to avoid capture took refuge in the ports of Greece (then neutral) and which were captured two years later by the French upon the occupation of Greece by Great Britain and France were not protected by the Sixth Convention, the purpose of which was to secure the immunity of vessels "surprised in the port of a belligerent in the course of commercial enterprises."

[2] See the list in *Judgments of the High Prize Court* of the *Republic of China* (table of contents).

[3] The *Samsen* and others, 45 Clunet, p. 1316; and the *Chantaboon* and others, 46 *ibid.*, p. 428. See Secs. 112, 196, *supra*.

such vessels were entitled to the benefit of the Sixth Convention. They were, as previously stated, seized by the executive authorities and expropriated apparently on the assumption that they were not protected by the Convention.[1] The Italian government, as we have seen, ordered the sequestration of enemy merchant vessels which had sought asylum in the ports of Italy when Italy was still neutral and which were there when Italy entered the war. Subsequently they were put in the custody of the Prize Commission, by which they were condemned, apparently not on the ground that the Sixth Convention did not protect refugee ships but as a measure of reprisal and for the indemnification of Italian subjects who had suffered injuries in consequence of unlawful acts by the enemy.[2]

VI

Further Interpretation of Articles 1 and 2 of the Sixth Convention

Sec. 221. The Interdependence of Articles 1 and 2. An important question which the Prize Courts were called upon in a number of cases to decide, related to the connection between Articles 1 and 2 of the Sixth Convention. Article 1 affirms the desirability of according days of grace while Article 2 exempts from confiscation vessels which are not allowed to leave. Is the latter immunity dependent upon the granting of the former? In the case of the *Fenix*,[3] the German Supreme Prize Court responded in the negative. The claimants had argued that the application of the Convention was not subordinated to the concession of days of grace; this, they asserted, was clear from the discussions at the Hague Conference and from the declarations made by the delegates of the various states there represented. In admitting the force of this argument, the Prize Court said: "the concession of days of grace cannot be considered as a condition of the application of the Convention, in view of the fact that such a restrictive application is not justified by the language of the text. On the contrary, paragraph 1 of Article 2 refers expressly to the case of a ship which is not authorized to leave port and for which, in consequence, there can be no question of a concession of days of grace."

[1] See Sec. 197, *supra*.
[2] See Sec. 194, *supra*.
[3] I, *Entsch.*, 1; Fauchille et De Visscher, *Jurispr. Franc.*, p. 1.

In the cases of the *Gutenfels* and the *Bärenfels*,[1] the Prize Court for Egypt took the same view of the matter although the Privy Council upon appeal held that a definitive decision on the question would have to be deferred until the attitude of Germany in respect to the interpretation of the Convention could be ascertained, since "it was a question of law arising on an international document which involved a reciprocal obligation performable only at the end of the war."

Finally in the case of the *Blonde*, the *Hercules*, and the *Prosper*,[2] decided in February, 1922, after the close of the war, the Privy Council ruled that the immunity accorded by Article 2 was not dependent upon the concession of days of grace in accordance with the recommendation of Article 1. Lord Sumner, adverting to the question "asked with so much force" why the Powers which were unable to agree that days of grace should be given at all could have intended to introduce a more extensive modification of the existing law by agreeing to abandon the right of capture of enemy ships found in their ports, remarked that the true question was not *why* they should have done this but whether they had actually done it. He then gave the following luminous interpretation of the Convention:

"The Powers, great and small, assembled at the Hague in 1907 in what was undoubtedly a great effort, involving mutual concessions and separate sacrifices, to regulate and to humanise the practices of maritime war. Is it consistent with their dignity, or with the seriousness of the negotiations, to read a part of their handiwork as meaning that a belligerent need not spare an enemy ship in his own port at all unless he chooses, but that if, from good nature or improvidence, he waives his right to bar her exit absolutely, he is to be bound by convention to do more than he chooses to do by express grace, and may then only detain, when otherwise he could seize? To say that the compact expressed in Article 2 has been providently entered into in case two belligerents should reciprocally grant days of grace under Article 1, but that until that event happens it is a mere foretaste of things to come, is to attenuate this Convention to the very verge of annulling it. It is all the more unworthy of such an occasion to place so narrow a meaning on the article because the length and character of the opportunity for departing in peace rests entirely with the grantor of it. In itself, a concession requiring immediate departure differs only nominally from a belligerent act inhibiting departure altogether. Is the modification of belligerent right to take place only in the one case, and not in the other? and, if so, on what show of reason can it be founded, or to what inveterate prejudice or ingrained self-interest has so illogical an arrangement been conceded?

[1] IV, Lloyd, 336; II, Br. & Col. Pr. Cas., 36. See also Secs. 110 and 111, *supra*.
[2] X, *ibid.*, 246; III, *ibid.*, 1031.

"Articles 3 and 4, however, which are strictly *in pari materia,* seem to place the matter beyond doubt. Article 3 contains no references to Articles 1 and 2. It deals with a case to which days of grace and opportunities of departure have no application—that is to say, to ships which are found by their enemy at sea on the outbreak of war. The argument is unaffected by the fact that, as to this Article, Germany made reservations at the time when the Convention was ratified, for the effect of the reservation is limited to the Article with which it deals. A reservation as to a part of the Convention is quite consistent with adoption of the rest of it. The article, clearly and independently of the others, requires that such ships, although by the law of nations good prize, may not be confiscated —that is, seized and brought before a Court of Prize for condemnation. They may only be detained—of course, under the order of such a court and upon conditions imposed by it. Further, when Article 4 comes to deal with cargo on board 'vessels referred to in Articles 1 and 2,' it prescribes the same measure of liability as that laid down in Article 3, and describes that prescription as being an identical principle. Their Lordships, therefore, think it clear that in effect this Convention says: 'Ships which find themselves at the outbreak of war in an enemy port shall in no case be condemned, if they are not allowed to leave, or if they unavoidably overstay their days of grace, but it would be better that they should always be allowed to leave, with or without days of grace.' In effect, while Article 1 is only optional, Article 2 is obligatory. They reject the construction which makes the prohibition upon confiscation depend on a prior election to do what Article 1 desiderates, but does not require."

The Prize Court of Siam, however, decided that if Article 1, recommending days of grace, was not observed by the enemy, Article 2, relative to non-confiscation, was not binding upon the opposing belligerent.[1]

Sec. 222. Status of Ships to Which Entrance to Port Was Refused. In case an enemy merchant vessel, or a neutral vessel which in consequence of a declaration of war subsequently becomes an enemy vessel, seeks entry to a belligerent port but is not allowed by the local port officials to enter, is it entitled to the benefit of Article 1 of the Sixth Hague Convention?

This question came before the Prize Court of Malta in the case of the *Erymanthos,*[2] a German vessel which arrived off Malta in ignorance of the outbreak of hostilities and was evidently intending to enter the port when it was ordered to a place of anchorage in St. Paul's Bay where it was captured. Counsel for the claimants argued that if the vessel had not actually entered the port it was desirous of entering it and was only prevented from so doing by the warning steamer and he quoted the well known principle *Quoties per eum cuius interest conditionem*

[1] The *Samsen, Trautenfels* and Others, 45 Clunet, p. 1316.
[2] I, Br. & Col. Pr. Cas., 339. See also Sec. 213, *supra.*

non impleri fiat quominus impleatur perinde haberi ac si impleta conditio fuesset. The Court thought that this principle of the civil law was hardly applicable to the case. No government, it said, has the duty to allow an enemy ship to enter a port and no enemy ship has a right to claim admittance. The Convention only exempted enemy ships from seizure, or better, it only recommended the giving of them days of grace if they had succeeded in entering port in ignorance of hostilities; so that while no government was obliged to admit an enemy ship into its ports, the ship, if it learned of the hostilities before actually entering the port, was liable to seizure if it did not enter. "Paragraph 2 of Article 1 must, with regard to German ships, be construed to mean that if an enemy ship is allowed to enter a harbour, the government thus allowing it to enter, while still ignorant of the existence of hostilities, cannot subsequently capture the ship." It was held, therefore, that the vessel was captured at sea and Germany not having ratified Article 3 which would have protected it from confiscation, it must be condemned. The Court admitted that "this very restrictive interpretation" of Article 1 of the Convention "apparently involved hardship" but it added that "with regard to German steamers such hardship is due to the action of their own government."

In the case of the *Belgia*,[1] a German vessel which had attempted to enter an English port on August 4, 1914, before the outbreak of war between Great Britain and Germany and when therefore the vessel was still neutral in respect to Great Britain, the Privy Council held that the above mentioned interpretation placed on Article 1 applied equally to neutral vessels which became enemy vessels by a declaration of war subsequent to their attempted entry. Sir Robert Finlay for the claimants argued that the dock master had no right to prevent the *Belgia* from entering the port but in the opinion of their Lordships he did not exceed his authority, and there was no obligation to admit the vessel, admission being a matter of courtesy, not of right.

Sec. 223. Refusal of Safe-Conducts. Suppose permission to leave port is allowed but a pass or safe conduct is refused to the master. Is the ship liable to confiscation if under these circumstances it neglects to avail of the offer?

The Egyptian Prize Court had occasion to discuss this point in the case of the *Bärenfels* (*supra*), a German merchant vessel

[1] IV, Lloyd, 134; II, Br. & Col. Pr. Cas., 32. See Secs. 210, 216, *supra*.

seized at Port Said after the outbreak of the war. The vessel was free to leave at any time between August 14 and October 13, 1914, but no safe conduct was offered the master and in the opinion of the Court it would have been refused if requested. The Court held that under such circumstances the vessel was not to be deprived of the protection afforded by the Sixth Convention.

"Permission to leave," said Judge Cator, "unless accompanied by a safe conduct, is wholly illusory; it in no way satisfies the intention of Article 1 of the Convention; and if the *Bärenfels* had steamed out of Port Said it may be postulated as a certainty that she would have been captured on reaching the high seas. I have no doubt that Article 2 applies and the ship cannot be confiscated." "When a proclamation offering days of grace is issued," said the Judicial Committee, "it ought to be explicit and unambiguous."[1]

When, therefore, a vessel was seized and put in charge of a watchman and her papers and charts removed with no intimation that in case the master applied for a pass they would be restored and he would be allowed to leave, the ship was not liable to confiscation even if no request was made for a pass. The prosecution, it was said, should make it clear that, in case the masters wished to avail of the offer, passes would be given and their papers restored.

"It would ill become a sovereign power," the Judicial Committee added, "and would ill become a Court of Prize adjudicating upon the rights of others . . . to seek to give effect to a proclamation which was less than clear, in order to curtail the advantages which the Convention was intended to secure to a ship which finds itself in its enemy's port."

But where a vessel was allowed to leave and was offered a sufficient pass to a neutral port, but refused to take advantage of the offer she was held to be not protected by the Convention.[2] It was not necessary, the Court held, that the pass should be unconditional; reasonable conditions might be attached to it, such as the obligation of the master to discharge within a limited time the cargo at the port to which it was consigned and depart therefrom within 48 hours after the completion of the discharge. Refusal to leave with the offer of such a pass rendered the ship liable to confiscation.[3]

[1] The *Turul*, VIII, Lloyd, 449; III, Br. & Col. Pr. Cas. 356.
[2] The *Achaia*, V, *ibid.*, 63; II, *ibid.*, 45; see also the *Pindos*, V, *ibid.*, 69; II, *ibid.*, 146.
[3] The *Concadoro*, V, *ibid.*, 92; II, *ibid.*, 64.

Sec. 224. What Constitutes *Force Majeure?* By Article 2 of the Sixth Convention a merchant vessel which owing to circumstances of *force majeure* is unable to avail of permission to leave, cannot be confiscated. In the cases of the German merchant vessels seized by the Belgian authorities in the ports of Antwerp, Ostend, and Ghent the owners contended that even if the vessels were free to leave, as the Belgian government asserted they were, they were unable to do so owing to circumstances of *force majeure* resulting from their inability to procure adequate crews and pilots to replace those who had left to obey the German mobilization order. The Belgian Prize Council, however, rejected this contention and held that this was not a case of *force majeure* in the sense of the Convention. In any event, said the Prize Council, the masters could, if they had desired, have obtained crews from among neutral seamen, a considerable number of whom were there without employment. Furthermore, it was added that at the moment of capture no allegation was made regarding inability to leave on account of lack of crews and pilots. It was evident, therefore, that their masters did not desire to leave, for the reason that had they done so they would have been captured in the North Sea.[1]

The Egyptian Prize Court held in the case of the *Achaia,* and the decision was affirmed on appeal by the Judicial Committee, that the refusal of a vessel to leave under a sufficient pass offered it could not be said to have been due to *force majeure*[2] nor was the refusal of the master to leave because of his alleged lack of funds with which to purchase coal and provisions, especially since he had refused an advance from the consignees of the cargo, to be regarded as a case of *force majeure.* The Prize Court thought it would be stretching the meaning of the Convention to the "breaking point" to hold that this constituted circumstances "beyond control." This interpretation was approved by the Privy Council on appeal.[3] In the opinion of their Lordships "the *force majeure* contemplated in the Article is one which renders the vessel unable to leave the port and cannot be construed to include the circumstance that the master has not been provided by the owners with sufficient financial resources to continue his voyage." But where a ship had been seized in a

[1] See the cases of the *Minna;* the *Feronia;* the *Elbing, Hanau* and *Tasmania;* the *Delos;* the *Atto* and *Ganelon;* the *Wartburg* and others, 47 *Rev. de Droit Int.,* pp. 138, 190, 271, 277, and 289.

[2] V, Lloyd, 63; II, Br. & Col. Pr. Cas., 45.

[3] The *Concadoro,* V, *ibid.,* 92; I, *ibid.,* 390, and II, *ibid.,* 64.

British port at the outbreak of war and put in charge of a watchman and her papers and charts removed, the general statement in a proclamation subsequently issued, allowing days of grace was not a sufficient intimation to the master that if he chose to apply for a pass the watchman would be removed and his papers and charts restored and he would be free to depart within the time mentioned in the proclamation. If, therefore, he remained, his ship was not liable to condemnation because his inability to leave would be a case of *force majeure* within the sense of Article 2 of the Hague Convention. The Judicial Committee added, however, that if the master had had the opportunity of departing but had for reasons of his own decided not to avail himself of it, as, for example, because he could not sail without coal and could get no money to procure a supply or because he was not sufficiently confident that a British passport would protect him from capture by enemy vessels, "then it has been settled that in such a case it is his own choice—it may be also his own misfortune —that detains him in the port, but the ship is liable to be confiscated because it cannot be truly said that *force majeure* is what has prevented him from taking advantage of the opportunity."[1]

VII

Proper Orders to Be Issued by the Prize Courts

Sec. 225. Chile Orders. There was some doubt and some difference of opinion among the British Prize Courts as to the proper orders which they should make in respect to enemy ships which were entitled to the benefit of Article 2 of the Sixth Convention. In the case of the *Chile*,[2] the first to come before a British Prize Court, the Attorney-General stated that since no information had been received from the German government as to what course it proposed to adopt in regard to British ships found in German ports at the outbreak of the war, that is, since there was no "reciprocal arrangement" that the ships of both countries should be released, he would ask for an order which

[1] The *Turul*, VIII, *ibid.*, 449; III, *ibid.*, 356. See also the Case of the *Tergestea* (II Lloyd 149) where the English Prize Court held that the inability of an Austrian ship to leave because of congestion in the port and the absence of proper facilities for discharging her cargo constituted a case of *force majeure* within the meaning of the Convention.

[2] I, Lloyd, 8; I, Br. & Col. Pr. Cas., 1.

would not involve the instant condemnation of the vessel, but for an order of detention with right of the Crown to apply later for an order of condemnation in case it was ascertained that Germany's course justified the confiscation of the vessel. Such an order, he said, would preserve to the Court full control and jurisdiction over the ship and yet it would be a recognition of the application in letter and spirit of Article 2 of the Convention. It would, at the same time, suspend the transfer to the Crown of title to the vessel, so that if as a result of some disaster unconnected with the war, the ship should be destroyed, the ownership would still be in the claimants and not in the Crown. In reply to a query by the President of the Prize Court as to the meaning of Article 2, the Attorney-General stated that, in his opinion, it meant that at the end of the war a merchant vessel protected by the Article would be restored without payment of compensation by the government. He did not understand that in the meantime the property in the ship would pass from the original owners to the Crown and then back again at the end of the war. If, therefore, the ship was lost during the period of detention, the government would not be responsible. The order for which he asked meant that the ship should be so dealt with by the Prize Court as to enable Article 2 to be applied at the end of the war, namely that the *Chile* should be adjudged as belonging at the time of capture to the enemies of the Crown and as such was rightfully seized and that she be detained until further order with the right of the Crown at any time to apply for a decree of condemnation. The President complied with this request and issued an order for the detention of the vessel "until a further order should be issued by the Court." The language of the order was not strictly in accord with the Prize Court rules of 1914 (Order XXVIII) but it was followed by the same court in the cases of the *Tommi* and the *Rothersand*[1] and others and by the Prize Courts of South Africa,[2] Canada,[3] and of Jamaica.[4]

Sec. 226. Action of the Prize Court for Egypt. In the case of the *Gutenfels* the Prize Court for Egypt at first issued a "Chile order" in respect to a German vessel seized in a Suez Canal port but subsequently by a "further order" declared that the vessel must be restored or her value paid to the owners at the

[1] II, Lloyd, 1; I, Br. & Col. Pr. Cas., 16.
[2] The *Hamm*, No. 5, and *Apolda*, No. 6 (*Cases Decided in the Prize Courts of South Africa*, p. 15) and the *Sturmvogel and Seeadler* (*ibid.*, 29).
[3] The *Bellas*, I, Br. & Col. Pr. Cas., 95.
[4] The *Atlas and Lighters*, II, *ibid.*, 470.

conclusion of the war. Upon appeal by the Crown the Judicial Committee varied the judgment of the Prize Court by substituting a "Chile order" of detention until further order.[1] Thus the correctness of such orders was approved by the highest judicial authority. In the case of the *Bärenfels*,[2] Judges Cator and Grain of the Prize Court for Egypt disagreed as to the proper order to make, the former holding that the vessel should be detained until the end of the war when it must be restored to her owners or the value paid them, while the latter held that a simple order of detention, that is a "Chile order," should be made with liberty of the Crown to apply at any time for an order of condemnation. Judge Cator being the senior member of the Court, his order prevailed and was therefore the order of the Court. Upon appeal the Judicial Committee, however, approved the dissenting view of Judge Grain and substituted a "Chile order," as it did in the cases of the *Gutenfels*,[3] the *Prinz Adalbert*,[4] the *Kronprinzessin Cecilie*[5] and others. It may be observed that in a number of cases where orders had been made for detention until further order, with a declaration that the ships should be restored or their value paid to the owners at the conclusion of the war such orders were upon appeal to the Judicial Committee reversed and decrees of condemnation substituted therefor.[6]

Sec. 227. Final Disposition of Ships Detained Under "Chile Orders." Ships against which "Chile orders" were made unless superseded by decision of the Judicial Committee substituting orders of condemnation therefor, remained in the custody of the Prize Court. But under the terms of such orders the Crown was always at liberty to apply to the Court for a further order of condemnation which it sometimes did with success.[7] It was not until some months after the Treaty of Versailles had been ratified that the Crown took steps to obtain definitive decisions regarding the final disposition of such vessels. In the case of the *Marie Leonhardt*,[8] a German vessel against which a "Chile order" had been made in August, 1914, the Crown in 1920 asked the Prize Court for a decree of condemnation. Sir Henry Duke,

[1] IV, Lloyd, 336; I, Br. & Col. Pr. Cas., 102.
[2] I, Br. & Col. Pr. Cas., 123.
[3] I, Br. & Col. Pr. Cas., 123.
[4] IV, Lloyd, 336; II, Br. & Col. Pr. Cas. 36.
[5] IV, *ibid.*, 360; II, *ibid.*, 70.
[6] For example the *Marquis Bacquehem*, V, *ibid.*, 79; II, *ibid.*, 58.
[7] Unless of course in consequence of appeal the case was in the Privy Council awaiting the final decree of that Court. Ships detained under a "Chile order" were therefore in an anomalous position. See the *St. Tudno*, V, Lloyd, 198; II, Br. & Col. Pr. Cas. 272.
[8] X, Lloyd, 178; III, Br. & Col. Pr. Cas., 761.

then President of the Court, held that in the absence of a reciprocal agreement between Great Britain and Germany relative to the application of the Sixth Hague Convention such ships were liable to condemnation, there being no rule of international law which protected them and he so ordered. Later in the case of the *Blonde, Hercules,* and *Prosper,*[1] vessels belonging to former German subjects who had in the meantime become citizens of Dantzig in consequence of the Treaty of Versailles and who invoked their new nationality as a reason for better treatment than had been accorded German subjects in the case of the *Marie Leonhardt,* Sir Henry Duke reaffirmed his judgment in the latter case. But upon appeal, the Judicial Committee (February, 1922)[2] while affirming the judgment in regard to the position of the citizens of Dantzig, reversed Sir Henry Duke's decision confiscating the vessels, this on the ground that the Sixth Hague Convention was applicable and protected the ships against confiscation. It was held to be in force because the correspondence between the German and British governments shortly after the outbreak of the war relative to the treatment of the vessels of each in the ports of the other showed that the British government was satisfied that there existed on the part of the German government an intention to observe the Convention, as shown by the procedure of the Crown in asking merely for orders of detention, instead of orders of condemnation and by the Prize Courts in making such orders.[3]

Sec. 228. Who Should Bear Expense of Detention? The question of who should bear the expense involved in the detention of ships against which "Chile orders" were made was discussed by the South African Prize Court in the case of the *Part Cargo ex Apolda.*[4] Here, said the Court, were ships laden with cargoes and detained in port, and upon which crews had to be placed for their protection. Fire broke out on one of the ships and expenses were incurred in extinguishing the fire. The Court ordered the cargo to be sold to pay the expenses, although it confessed doubt as to its authority to do so, the Hague Convention being silent on the matter. The Court stated that no doubt the enemy owner was in theory responsible but it was practically impossible to obtain any money from him to meet expenses as they arose and it might be equally impossible to recover anything

[1] X, *ibid.*, 225; III, *ibid.*, 875.
[2] X, *ibid.*, 246; III, *ibid.*, 1031.
[3] See further as to this case, Secs. 111, 200, 221, *supra.*
[4] *Cases Decided in the Prize Courts of South Africa,* p. 57.

from the owner of the goods at the end of the war. In the present case, moreover, the goods were such that they were liable to deteriorate or perish. Under the circumstances the Court thought that although it had no express authority to do so it was to the interest of all concerned that the goods should be sold and it was so ordered.

VIII

Treatment of Cargoes on Vessels Protected by the Sixth Convention

Sec. 229. French Jurisprudence. By the terms of Article 4 enemy cargoes on board vessels referred to in Articles 1 and 2 are only subject to detention and restoration at the close of the war without payment of compensation, or to requisition on payment of compensation. Paragraph 2 of the same Article declares that the rule shall apply equally to cargoes on vessels referred to in Article 3, that is, those encountered at sea in ignorance of hostilities. Germany and Russia, however, had reserved their ratification to paragraph 2 and were not therefore entitled to invoke its benefit. In the case of the *Czar Nicolai II* [1] the French Prize Council held that in consequence of the German reservation enemy cargo found on board a German merchant vessel which had left its last port of departure before the outbreak of war and was encountered by a French cruiser at sea in ignorance of hostilities, was lawfully captured and was liable to condemnation.[2] It also held that the provisions of the Convention exempting from confiscation enemy goods laden on enemy ships seized in port at the outbreak of war or encountered at sea, in the circumstances referred to in the Convention, had no application to enemy goods laden on an enemy ship which had taken refuge in a neutral port of a third power (Spain) in order to avoid capture and which was captured by the French two years later.[3]

Sec. 230. Article 4 Applicable Only to Enemy Goods on Enemy Vessels. In the case of the *Roumanian* [4] the German owners of a cargo of petroleum on a British ship brought into a

[1] Fauchille, *Jurispr. Franc.*, p. 10.
[2] Compare also the cases of the *Porto*, the *Barmbek*, the *Frieda Mahn* and the *Martha Bockhahm*, *ibid.*, pp. 1-10.
[3] The *Marienbad*, 27 *Rev. Gén.* (1920), 25, and the *Margaritte*, *ibid.*, 96.
[4] I, Lloyd, 191; I, Br. & Col. Pr. Cas., 75.

British port after the outbreak of war having invoked the benefit of Article 4 of the Sixth Convention the British Prize Court held that the Convention was not applicable to this case at all, since the *Roumanian* was a British and not an enemy vessel and it added that even if it could be regarded as analogous to that of an enemy cargo on board an enemy ship under Articles 3 and 4 of the Convention, the German owners could not invoke the protection of those articles because of the German reservation thereto.[1]

In the case of the *Schlesien* (Part Cargo),[2] a German vessel laden with an Austrian cargo, encountered at sea on August 6, 1914, after the outbreak of war between Great Britain and Germany but before the outbreak of war with Austria-Hungary, Sir Samuel Evans held that Article 4 should not be construed to cover a case like this, that is, of Austrian goods on a German ship. "I think," he said, "that the second part of Article 4 must have been intended to apply to German goods upon a German ship coming within Article 3. It refers to enemy cargo; it must be read as enemy cargo, on board an enemy ship encountered on the high seas, in the circumstances set out in Article 3." . . .

Sec. 231. German and Italian Jurisprudence. The German Prize Court went to the extreme length of holding that Germany was not bound to make compensation for the destruction of *neutral* goods on enemy vessels encountered at sea in the circumstances mentioned in Article 3 and sunk by German cruisers.[3]

But the Italian Prize Commission held that neutral or allied goods seized on board an enemy merchant ship must be released on payment of the expense of guarding and delivering them.[4]

IX

Interpretation and Application of Article 3 of the Sixth Hague Convention

Sec. 232. British Interpretation of the Effect of the German Reservation to Article 3. This Article exempts from confiscation enemy merchant ships which left their last port of

[1] There was a slight error in the statement of the Court since the German reservation did not apply to the whole of Article 4 but only to paragraph 2 thereof.

[2] IV, Lloyd, 324; II, Br. & Col. Pr. Cas., 268.

[3] Case of the *Kaipara*, I, *Entsch.*, 288; Fauchille et De Visscher, *Jurispr. All.*, p. 213.

[4] The *Ambra*, and the *Moravia*, Fauchille et Basdevant, *Jurispr. Ital.*, pp. 93, 103. It does not appear from the other cases in which enemy merchant

departure before the commencement of the war and which are encountered on the high seas while still ignorant of the outbreak of hostilities. By paragraph 2 of the Article such vessels are only liable to detention on the understanding that they shall be restored after the war, without compensation, or they may be requisitioned or even destroyed, on payment of compensation. Of the belligerents in the late war, neither Germany nor Russia had ratified Article 3, this on the ground that the obligation to make compensation in case of destruction established an inequality between States by imposing financial burdens on those Powers which, while lacking naval stations in different ports of the world, were not in a position to take vessels which they seized into port but would be obliged to destroy them, in which case compensation would have to be made therefor.[1] In consequence, all German merchant vessels "encountered" and captured on the high seas by enemy war ships in the circumstances set forth in Article 3 were confiscated as good prize by the Prize Courts into whose custody they were placed.[2] On the other hand, the German government was under no obligation to make compensation for enemy merchant vessels which were encountered by German cruisers or submarines on the high seas in similar circumstances and which were destroyed.[3] It turned out, however, that Germany's loss in consequence of her reservation to Article 3 greatly outweighed the advantage, for while few enemy merchant vessels were encountered on the high seas by German war ships in the circumstances mentioned in Article 3, a considerable number of German vessels were thus encountered by British and French cruisers and instead of being merely detained were confiscated. The number so confiscated was increased by the strict interpretation which the British and French Prize Tribunals, in particular, placed upon the Convention, especially in regard to the meaning of the word "port."

vessels were condemned by the Italian Prize Commission whether their cargoes were enemy or neutral, and if neutral what disposition was made of them.

[1] *Actes et Documents de la Deux. Conf.* Vol. I, p. 236; Vol. III, p. 918.

[2] See the British cases of the *Marie Glaeser*, the *Perkeo*, the *Leda*, the *Schlesien*, and the *Rufidji* (So. Afr. 13); the French cases mentioned below, particularly the *Walküre;* and the Japanese case of the *Zuimo*.

[3] See for example the case of the *Kaipara* (I, *Entsch.*, 288; Fauchille et De Visscher, *Jurispr. All.*, 213), an English vessel encountered at sea and destroyed by a German war ship. The German Supreme Prize Court held that Article 3 not having been ratified by Germany, enemy merchant vessels encountered at sea at the outbreak of war, of the existence of which they were ignorant, and destroyed by German cruisers, must be considered as good prize, for the destruction of which Germany was not bound to make compensation.

Sec. 233. The Same. French Interpretation. In the case of the *Porto* [2] the French Prize Council was called upon to interpret the effect of the French prize instructions relative to enemy ships encountered at sea in ignorance of hostilities and the weight of the German reservations to Article 3 of the Convention. Since Article 6 of the French regulations (*Instructions sur l'application du Droit International en cas de Guerre,* 1912) declared that all enemy merchant vessels, without exception, which left their last port of departure before the outbreak of war and which are encountered at sea in ignorance of hostilities were not liable to capture and since neither the French law ratifying the Sixth Convention nor the decree promulgating it had referred to the German reservation, the claimants argued that the rule of exemption was binding on the Prize Council, regardless of the non-applicability of Article 3 of the Hague Convention. But the Prize Council rejected this contention and held that the law and the decree referred to had no other object than to render executory for France the provisions of the Convention as it was, with the German reservations, and that the sole object of Article 6 of the Prize Instructions being to assure the application on the part of the French maritime authorities of Article 3 it could not have had the effect of extending the benefit of the Article to Powers which had refused to ratify it.

As to the weight of the German reservations to Article 3 the claimants contended that the reservations were never intended to apply to the Article as a whole but were directed only against the second paragraph which established an inequality between Germany, on the one hand, and those powers on the other, which possessed ports in various parts of the world. As to the first part of the Article which established an immunity against confiscation, Germany had always favored, it was said, that principle and the German delegation had so declared at the Second Hague Conference. Their reservations were not, therefore, intended to sanction the policy of confiscation of merchant vessels encountered at sea at the outbreak of war while ignorant of the existence of hostilities, but it was the obligation in respect to compensation in case of destruction when it was impossible to take vessels in for detention against which the reservations were intended.

The Prize Council, however, made short shrift of this argument. It resulted from the documents, said the Council in its *considérants,* and especially from the *procès-verbaux* of the sessions

[2] Fauchille, *Jurispr. Franc.*, 1.

of the Fourth Commission and of the plenary session of the Hague Conference, that the reservations of the German delegation—confirmed expressly by the act by which Germany ratified the Sixth Convention—had, whatever may have been the motives, been directed against the Article as a whole; that it could not have been otherwise, since the provisions of the Article formed an indivisible whole and was not therefore susceptible of piecemeal ratification and application; and that in making the reservations, and this appeared from the declarations contained in the *procès-verbaux*, the German delegates intended to maintain in force the preëxisting and uncontested right of captors to confiscate, and even destroy, without indemnity, enemy ships encountered at sea in the circumstances specified in Article 3. The same arguments were put forward and the same decisions reached by the French Prize Council in the cases of the *Barmbek*,[1] the *Frieda Mahn*,[2] the *Martha Bockhahm*,[3] the *Czar-Nicolai II*,[4] and the *Walküre*.[5] The decisions were sustained, on appeal, by the Council of State.[6]

Sec. 234. Strict Interpretation of Article 3. In a number of cases the Prize Courts were called upon to decide whether particular captures actually took place "at sea" in the circumstances mentioned in Article 3 of the Convention or "in port" in the circumstances mentioned in Article 1. As has already been pointed out [7] the British Prize Court in the case of the *Möwe* [8] held that the word "port" as used in Article 1 did not mean a fiscal port but must be construed in the usual popular and commercial sense as a place where ships load and unload, embark and disembark their cargoes, and therefore a German vessel captured at a place which although in the fiscal port was not in the port in the popular or commercial sense was held to have been "encountered at sea" in the sense of Article 3. Germany not having ratified this Article the vessel was not entitled to the benefit thereof. This restrictive interpretation, as has been pointed out, was affirmed by the Judicial Committee in the case of the *Belgia*.[9] It was adopted equally by the French Prize Council and upon appeal by the Council of State [10] and also by the German Supreme Prize Court.[11]

[1] Fauchille, *Jurispr. Franc.*, 3. [2] *Ibid.*, p. 6. [3] *Ibid.*, p. 8.
[4] *Ibid.*, p. 10. [5] *Ibid.*, p. 59. [6] *Ibid.*, p. 183.
[7] See Sec. 210, *supra*. [8] II, Lloyd, 70; I, Br. & Col. Pr. Cas., 60.
[9] IV, Lloyd, 132; II, Br. & Col. Pr. Cas., 32. Cf. also the case of the *Erymanthos*, I Br. & Col. Pr. Cas. 339.
[10] The *Walküre;* Fauchille, *Jurispr. Franc.*, 303.
[11] The *Fenix* and the *Primula* (*supra*).

CHAPTER VIII

CAPTURE OF ENEMY PRIVATE PROPERTY AT SEA. THE DECLARATION OF PARIS

I

Preliminary Observations

Sec. 235. The General Rule of International Law. It is an established rule of international law that in general enemy private property captured at sea is liable to capture and condemnation as good prize. The exceptions to the general rule so far as *ships* are concerned have been discussed in the preceding chapters. It remains now to consider the exceptions to the rule when the property consists of goods (*les marchandises*) captured at sea. As has already been pointed out, the Prize Courts during the World War applied the rule of confiscation to enemy goods captured in ports or in interior rivers when if they had been captured at sea they would have been liable to condemnation.[1]

As is well known, the United States has endeavored at various times to bring about an agreement among the Powers to exempt all enemy private property at sea, whether ships or goods, except contraband of war, from confiscation and thus bring the law of maritime capture more into harmony with the law governing capture on land. But the efforts have been without success.[2] By a treaty concluded between the United States and Italy on February 26, 1871 (still in force),[3] it was provided that in the event of war between the high contracting parties the private property of their respective citizens and subjects, with the exception of contraband of war, should be exempt from capture or seizure on the high seas or elsewhere. The Italian merchant marine code

[1] *Supra*, Secs. 147 ff.

[2] As to the present status of the law and practice, see an article by H. S. Quigley, entitled "The Immunity of Private Property from Capture at Sea," 2 *Amer. Jour. of Int. Law*, pp. 22 ff.

[3] Article XII.

of 1877 (Article 211) sanctioned the principle of immunity of private enemy property from confiscation and authorized the government to suspend the right of capture on condition of reciprocity of treatment on the part of the enemy, and the Rules Relative to the Exercise of the Right of Capture promulgated on March 25, 1917,[1] excepted from liability to capture at sea enemy ships and goods in case of reciprocity of treatment being accorded by the enemy. No such reciprocity being accorded, the exemption was not put into effect during the late war. All the maritime belligerent Powers applied the rule of confiscation to enemy private property in goods captured at sea subject to the exception recognized by the Declaration of Paris, to be discussed below.

Sec. 236. Views of the Prize Courts as to Right of Confiscation. In various cases the Prize Courts discussed and affirmed the ancient rule of confiscability in such cases. In the case of the *Roumanian,*[2] which involved the liability to condemnation of an enemy-owned cargo laden on a British ship and seized in an English port, Sir Samuel Evans reviewed at length the law and practice regarding the capture of enemy private property at sea, on land, and in ports, rivers and creeks. Regarding the general practice he said:

"According to the practice of former times, and according to the views held by some of the most revered and authoritative international jurists, all enemy property on land, as well as on sea and in ports, creeks, and rivers, could be captured and confiscated. But from time to time, by special treaties, and subsequently by the mitigation of rules considered to operate harshly on enemy owners of private properties, capture of such properties on land has been avoided and has fallen into desuetude."

After quoting the opinion of Hall[3] he continued:

"It ought, however, to be borne in mind—what, indeed, is often forgotten—that a potent factor, and a beneficent object, in the mitigation of the severity of land seizure, was the desirability of saving from confiscation the property of citizens of an enemy State which was already in the belligerent country at the outbreak of war. A beginning was made by exempting moneys lent by individuals of an enemy State to a belligerent State. Then real and immovable property was made an exception, at first from absolute confiscation, and later from sequestration of its income. Then came treaties allowing time for the withdrawal of mercantile property from a belligerent country at the outbreak of war."

[1] Text, Fauchille et Basdevant, *Jurispr. Ital.*, Annexe, p. 1.
[2] I, Lloyd, 283; I, Br. & Col. Pr. Cas. See also Sec. 147, *supra.*
[3] *International Law* (6th ed.), p. 435.

He then quoted the opinion of Dana in his edition of Wheaton[1] which he said "not only dealt admirably with the distinction between seizure on land and at sea but it also gives prominence to the reasons why 'maritime merchandise' and 'cargoes' should be differently regarded." The quotation from Dana concluded as follows:

"The matter may, then, be summed up thus: merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for purposes of war, is *prima facie* a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character, and some are not. There are very serious objections, of a moral and economical nature, to subjecting all property on land to military seizure These objections have been thought sufficient to reverse the *prima facie* right of capture. To merchandise at sea, these objections apply with so little force that the *prima facie* right of capture remains."

Sir Samuel added:

"We start, accordingly, in considering the present case, with the broad assumption that all enemy property—ships and cargoes—may, after the outbreak of war, be captured *jure belli* on the sea, or in rivers, ports, and harbours of this country. (There are other captures which can be made which do not concern this case.)"

Upon appeal,[2] the Privy Council affirmed the opinion of Sir Samuel. Referring with approval to the above quoted opinion of Dana, Lord Parker added:

"It will be found that Halleck (*International Law,* Vol. III., p. 126) states that whatever bears the character of enemy property (with a few exceptions, not material for the purpose of this case), if found upon the ocean or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. It is the enemy character of the goods and not the nationality of the ship on which they are embarked or the date of embarkation which is the criterion of lawful prize. This is in full accordance with Lord Stowell's statement in the *Rebeckah* of the manner in which the Order of 1665 defining admiralty droits has been construed by usage."

Sec. 237. The Same (Continued). The Chinese Prize Court in the case of the *Silesia*[3] affirmed that it was "an inherent right" of a belligerent to capture enemy ships and cargoes and the German Supreme Prize Court in the case of the *Glitra* asserted that "the seizure and capture of an enemy ship was as against

[1] 8th ed., 1866, note 171, p. 451.
[2] II Lloyd 385; I Br. & Col. Pr. Cas. 536.
[3] Cheng, Judgments of the High Prize Court of the Republic of China, 88.

third States a lawful act of war, authorized by international law."[1] Likewise the French Prize Council in the case of the *Lloyd*[2] mentioned among its *considérants* that "according to the principles of the law of nations consecrated by the marine ordinance of August 1681, etc. all ships belonging to enemies are good prize."

The Belgian Prize Council in the case of the *Zaanstroom*[3] observed that the principle of the inviolability of private property at sea did not exist and that the right of capture, established by universal and constant usage had been reaffirmed, subject to certain restrictions, by the Hague Convention (No. XI) and by the Declaration of London. In the case of the *Agiena*[4] the Belgian Prize Council discussed at length the law of maritime capture. Among the *considérants* of the judgment was the following: "whereas the right of capture is among those which the most ancient usages have consecrated by an international law recognized by all peoples, that this right has been maintained, save certain restrictions, by numerous dispositions, explicit or implied, of the Hague Convention although it had been the object in the conference of spirited criticism and the delegates of the majority of States had voted a proposal for its abolition."

The subject was discussed at some length by the Italian Prize Commission in the case of the *Cervignano* and *Friuli*,[5] where it was said:

"The inviolability of private property at sea was proclaimed in the latter part of the 18th century under the economic theories of the time. But soon the pressure of antagonistic commercial interests of rival States, which often not only served as a determining motive for the unchaining of war, but directed the conduct of belligerents, imposed the restoration of the capture of enemy ships and cargoes as the most efficacious means of preventing an enemy from using the sea and of injuring the sources of his economic life and the conditions of his existence. The Italian parliament desired in its code of 1877 to abolish a practice which it considered to be contrary to the principles of the progress of civilization, but enlightened by experience, it did not fail to subordinate in practice the effects of abolition to the corresponding conduct of the enemy. This served to give the character of reprisal to the exercise of the right of maritime capture, which, when the opening of hostilities with Austria-Hungary became imminent, justified the King in authorizing a derogation from the provisions

[1] I *Entsch.* 260; Fauchille et De Visscher, *Jurispr. All.*, 26.
[2] Fauchille, *Jurispr. Franc.*, 334. Likewise in the case of the *Almazora* (27 *Rev. Gén.*, 1920, *Jurispr.* 72), it declared that the right to seize on board neutral merchant vessels goods destined to the enemy, was "an essential attribute of the sovereignty of belligerent States."
[3] The *Moniteur Belge*, Jan. 17, 1920, p. 400.
[4] *Ibid.*, p. 404.
[5] Fauchille et Basdevant, *Jurispr. Ital.*, 178.

of the above-mentioned code, when he did by a decree of May 16, 1915,[1] reciting that 'the belligerent Powers in the present international conflict are exercising the right of capture and have retained in their ports enemy merchant vessels found there at the outbreak of hostilities.'"

The Japanese Prize Court said in the case of the *Zuimo* that "the customary international regulations recognize that ships and their cargoes belonging to warring nations are justly to be seized, except in cases which come under international law or treaties existing between the two nations at war" and in the case of the *Eorus* it was said by the same court that "it is the theory and practice of international law that the individual warring nation may capture an enemy ship at sea and that it may rightfully destroy the ship in case the operations of the captor ship would be hindered by taking it in to a home port."

In conformity with the right of capture thus affirmed by the Prize Courts a large number of privately owned enemy ships and cargoes, Austrian, Belgian, English, French, German, Italian, Montenegrin, Turkish, and Russian were condemned by the Prize Courts of the countries by whose forces the captures were made.

II

Exceptions to the General Rule

Sec. 238. Article 2 of the Declaration of Paris. The principal exception to the general principle that enemy private property at sea (apart from ships) is liable to capture and confiscation is found in Article 2 of the Declaration of Paris of 1856. This article declares that "the neutral flag covers enemy's goods with the exception of contraband of war." As already pointed out in an earlier chapter of this work,[2] the governments of the various belligerent countries in the beginning recognized the Declaration as a binding rule of international law, though some of them later by measures of reprisal in fact departed from the rule. At the outset, the Prize Courts also admitted it to be a settled and acknowledged part of the law of nations which they were bound to apply.[3] In the application of Article 2 various questions arose

[1] Text in Fauchille et Basdevant, *Jurispr. Ital., Annexe*, p. 1.
[2] *Supra*, Sec. 106.
[3] See notably the English case of the *Marie Glaeser* and the German case of the *Indian Prince*, discussed, *supra*, Sec. 107.

and the interpretations which the Prize Courts placed upon it are indicated in the decisions which here follow.

Sec. 239. Article 2 Does Not Protect Enemy Goods Seized on a Ship Flying the Flag of the Captor State. Case of the "Aldworth." This question first came before the British Prize Court at London in October, 1914, in the case of the *Aldworth*,[1] where the Crown asked for condemnation of a quantity of coal belonging to an Austrian steamship company, shipped before the outbreak of war on board a British ship seized in the port of Cardiff on August 21 after the expiration of the days of grace which had been accorded to Austrian ships and cargoes to leave British ports. Counsel for the claimants demanded the release of the goods on the ground that it had not been the practice in former wars to condemn enemy goods seized on British ships in British ports at the outbreak of war when such ships were about to leave in pursuance of permission granted. They pleaded that it was desirable that such goods should be protected in the same way as enemy goods on neutral ships are protected. Replying to a suggestion of Sir Samuel Evans that if this were true, the Declaration of Paris should have expressly said as much, counsel stated that this had not been done because it was not deemed necessary. Neither the Declaration of Paris nor the Hague Conventions, it was said, had pronounced on the matter, because it had not occurred to any one to raise the question. It was absurd, counsel added, to hold that the goods if seized on a British ship were condemnable, but to hold that they would not be, if they were seized on shore. Apparently it was the idea of counsel that in a case like this a British ship should be assimilated to British territory and enemy goods seized on a British ship should be released in accordance with the rule of immunity in respect to private property seized on land. Sir Samuel, however, took a different view of the matter and held that Article 2 of the Declaration of Paris afforded no protection to enemy property seized on a British ship. He concluded as follows:

"So far as enemy property on board a British ship is concerned, I have no doubt about it that it is property subject to seizure in port just as much as would be liable to capture if the ship was out in the open sea. The Declaration of Paris says that property is to be exempt if on a neutral ship (the object was to protect the commerce of neutrals); but I do not think it has ever been suggested until now that property belonging to the enemy which happens to be in a British ship is not subject to confiscation."

[1] I Lloyd 137.

Sec. 240. The Same (Continued). In the case of the *Miramichi*[1] decided in the following month, the facts and arguments were substantially the same, although other questions were raised. The goods were condemned by Sir Samuel Evans although seized on a British ship. It had never been urged, he said, that enemy goods were free from capture or seizure if they happened to be in British ships. This was the reason why there were no reported judgments on the point. Decisions of Prize Courts, however, were not lacking to show that enemy cargoes in British ships had been captured.[2] Regarding the effect of the Declaration of Paris, he said:

"As to the suggestion that the right of seizure or capture of enemy property carried as cargoes in British ships no longer exists after the Declaration of Paris, it is obvious that the Declaration only modified or limited the right in favour of neutrals for the benefit and protection of the commerce of neutrals and in the interest of international comities, and did not in any other respect weaken or destroy the general right.

"It is well known that the United States of America refrained from acceding to the Declaration of Paris because they desired that all property of private persons should be exempted from capture at sea—to which most other States have always refused to agree.

"And in practice what would become of such cargoes? A British ship could not, in times of war, carry it or hand it over to the enemy, directly or through any intermediary, as it is not permitted to her to have any intercourse with the enemy.

"In my view it is abundantly clear that enemy goods carried in British vessels are subject to seizure in port and capture at sea in times of war."

The same conclusion was reached by Sir Samuel in the cases of the *Juno*[3] and the *Roumanian.*[4] Upon appeal from the judgment in the latter case, the Judicial Committee approved the opinion of Sir Samuel regarding the liability to capture of enemy goods on British ships.[5] In the course of an elaborate opinion Lord Parker, adverting to the third contention of the appellants, that enemy goods on British ships, seized at the outbreak of war never were liable to seizure, and if so, they had long ceased to be so liable, said:

"The contention that enemy goods on British ships at the commencement of hostilities are not the subject of maritime prize was not argued before the President in the present case. It had already been decided by him in

[1] I Lloyd 157; I Br. & Col. Pr. Cas. 137.
[2] He cited the cases of the *Conqueror* (1 E. P. C. 118), the *Mashona* (2 Ch. Rob. 303) and *Brown* v. the *United States* (8 Cranch 110).
[3] I Lloyd 177; I Br. & Col. Pr. Cas. 151.
[4] I, *ibid.*, 191; I, *ibid.*, 75. See also Sec. 236, *supra.*
[5] II, *ibid.*, 378; I, *ibid.*, 536.

the *Miramichi*. Their Lordships have carefully considered the judgment of the President in the last-mentioned case, and entirely agree with him. The appellants' counsel based their contention on three arguments. First, they relied on the dearth of reported cases in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, emphasizing the fact that in the case of the *Juno* no authority could be found for the right of the master of a British ship on which enemy goods were seized as prize to compensation in lieu of freight, though if such goods were properly the subject of prize, the question must constantly have arisen. Secondly, they laid stress on certain general statements contained in textbooks on international law as to what enemy goods can now be seized as prize. Thirdly, they called in aid that part of the Declaration of Paris which affords protection to enemy goods other than contraband on neutral ships and the principle underlying or supposed to underlie such Declaration.

"With regard to the dearth of reported decisions, it is to be observed that the plainer a proposition of law, the more difficult it sometimes is to find a decision actually in point. If, on the one hand, it be difficult to find a case in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, it is, on the other hand, quite certain that no case can be found in which such goods have been held immune from seizure. Further, inasmuch as by international comity British Prize Courts have in general extended to neutrals the privileges enjoyed by British subjects, we should, if this contention be correct, expect to find that enemy goods on neutral ships at the commencement of hostilities were alike immune from seizure. Their Lordships have been unable to find any authority which gives colour to this suggestion. There appears, indeed, to be no case in which for this purpose any distinction has been drawn between goods on board a neutral vessel at the outbreak of hostilities and goods embarked on a neutral vessel during the course of a war."

Lord Parker added that such decisions as there were, certainly did not support but indeed contradicted the contention of the appellants. He then referred to the cases cited by Sir Samuel Evans in the case of the *Miramichi*, and especially the *Conqueror* from which it was clear that enemy goods embarked on British ships during hostilities were subjects of prize. He also referred to the case of the *Venus*[1] as one which appeared to be an authority against the appellant's contention.

As to the opinion of text writers, relied upon by the appellants, Lord Parker said:

"With regard to the general statements contained in textbooks on international law, it is to be observed that none of those cited in support of the appellants' contention appears to have been based on any discussion of the point in issue. On the contrary, they are for the most part based on a discussion of the effect of the Declaration of Paris. Their Lordships do not think that any useful purpose would be served by examining these

[1] Mentioned by Rothery in his *Prize Droits*, p. 129.

statements in detail. They will take one example only, that cited from Westlake's *International Law,* Part II., p. 145. The author has been discussing the effect of the Declaration of Paris, and sums up as follows:

> " 'We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which, as such, is capturable at sea.'

"In their Lordships' opinion the meaning of such statements must be judged by the context. They cannot be taken apart from the context as intended to be an exhaustive definition of what is or is not now the subject of maritime prize. It might just as well be argued that because the writer in the present case uses the expression 'capturable at sea,' he must have thought that enemy goods in neutral ships lying in British ports or harbours were, notwithstanding the Declaration of Paris, still subject to capture.

"Such statements are in any case more than counterbalanced by statements in other well-recognized authorities."

Considering the third argument of the appellants, that based on the Declaration of Paris, Lord Parker thus stated and answered their contention:

"Enemy goods on neutral territory were never the legitimate subject of maritime prize. Such goods could not be seized without an infringement of the rights of neutrals. The rights of neutrals are similarly infringed if enemy goods be seized on neutral ships, but the law of prize having for the most part been formulated and laid down by nations capable of exercising and able to exercise the pressure of sea power, the rights of neutrals have been ignored to this extent, that the capture of enemy goods in neutral vessels on the high seas or in ports or harbours of the realm has been deemed lawful capture. The Declaration of Paris is in fuller accordance with principle; it recognizes that no distinction can be drawn between neutral territory and neutral ships. To use Westlake's expression (p. 145, *International Law,* Part II), it assimilates neutral ships to neutral territory, recognizing that on both, the authority of the neutral state ought (except possibly in the case of contraband) to be execlusive. So far, the argument proceeds logically, but its next step is, in their Lordships' opinion, open to considerable criticism. If, say the appellants, neutral ships are assimilated, as on principle they should be, to neutral territory, British ships ought to be in like manner assimilated to British territory. Whatever may have been the case in earlier times, no one will now contend that the private property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown. The same ought, therefore, to hold of enemy goods found in British ships at the commencement of war. This part of the argument is, in their Lordships' opinion, quite fallacious. The Declaration of Paris, in effect, modified the rules of our Prize Courts for the benefit of neutrals. It was based on international comity, and was not intended to modify the law applicable to British ships or British subjects in cases where neutrals were not concerned. Its effect may possibly be summed up by saying that it assimilated

neutral ships to neutral territory, but it is impossible to base on this assimilation any argument for the immunity of enemy goods in British ships.

"The cases are not in *pari materia*. If the Crown has ceased to exercise its ancient rights to seize and appropriate the goods of enemy subjects on land, it is because the advantage to be thus gained has been small compared with the injury thereby entailed on private individuals, or in order to ensure similar treatment of British goods on enemy territory. But one of the greatest advantages of sea power is the ability to cripple an enemy's external trade, and for this reason the Crown's right to seize and appropriate enemy goods on the high seas or in territorial waters or the ports or harbours of the realm, has never been allowed to fall into desuetude. In order in the fullest degree to attain this advantage of sea power our courts have always upheld the right of seizing such goods even when in neutral bottoms, and neutrals have always admitted or acquiesced in the exercise of that right, either because it was deemed to be a legitimate exercise of sea power in time of war or because on some future occasion they themselves might be belligerents and desire to exercise a similar right on their own behalf. Those who were responsible for the Declaration of Paris had not to weigh the advantage to be gained by the seizure of enemy goods on neutral ships against the injury thereby inflicted on private owners, but against the demands of international comity. The fact that we sacrificed on the altar of international comity a considerable part of the advantages incident to power at sea is no legitimate reason for making a further sacrifice where no question of international comity can possibly arise."

The conclusion of their Lordships was that enemy goods on British ships had always been and still were liable to seizure and condemnation as prize, either on the high seas or in the ports or harbors of the realm.

This view was reaffirmed by the Judicial Committee in the case of the *Woolston*,[1] where it was again declared that enemy goods on board British ships at the commencement of hostilities are a proper subject of maritime prize and that there is no difference between enemy and British ships in this respect, unless it be a difference as to the presumption arising from the character of the ship.

In the case of the *Linaria*[2] the same conclusion was reached regarding Turkish owned goods shipped on a British vessel before the outbreak of war and which would have reached their port of destination (London) before the declaration of war against Turkey but for the acts of the British government. The

[1] II Lloyd 438; 1 Br. & Col. Pr. Cas. 554. To the same effect see the *Surat* and the *Kathiawar*, where enemy goods brought to South Africa on British ships were condemned by the South African Prize Court (So. Afr. cases, 67). See also the cases of the *La Palma* and the *Beira* (*ibid.*, 93, referred to *infra*, Sec. 147), where the South Africa Prize Court followed the decisions in the *Aldworth*, the *Miramichi* and the *Roumanian*.

[2] II Lloyd 286.

goods in this case were shipped from Bagdad on July 30, 1914, for trans-shipment at Bussorah to another vessel, but in consequence of certain orders issued by the British government no ships were allowed to take cargoes at Bussorah and the trans-shipment was delayed for two months, the cargo reaching London only on December 18, after the outbreak of war between Great Britain and Turkey (November 5). Sir Samuel Evans refused to take into account the delayed arrival due to the orders of the British government and condemned the goods on the simple ground that they were in fact enemy goods at the time of capture. The further fact that they were laden on a British ship and consigned for sale to a firm of British merchants in London made no difference.

Sec. 241. The Same (Continued). French and German Decisions. The French Prize Council likewise condemned enemy goods seized on ships flying the French flag. The French Naval instructions (as revised in 1916) expressly lay down the rule that enemy goods on ships flying the French flag or the flag of an allied State are liable to capture. The Prize Council held that since the Declaration of Paris exempted enemy property from capture only when it was under a *neutral* flag, the minister of marine was justified in demanding the condemnation of certain enemy goods seized on a French ship.[1] The German Prize Courts on the contrary declared that they had no jurisdiction of captures of enemy goods on German vessels since it was not expressly conferred by the German prize code and the international conventions were silent on the subject. The decisions of the British Prize Court in the *Miramichi* and the *Roumanian* were criticized as an "extensive interpretation" to justify the seizure and condemnation of enemy property captured on land—an interpretation which "does not conform to the progressive views of international law prevailing prior to the present war nor as meeting the expectations extensively cherished before the war as to the administration of international law in the event of war." [2]

Sec. 242. Article 2 Affords No Protection to Enemy Goods on Ship Flying Flag of Allied State. In the case of the

[1] The *Vénézuéla*, *Décisions du Conseil des Prises*, 503, and 27 *Rev. Gén.* (1920), *Jurispr.* 8. See also the case of the *Marqueritte*, where certain enemy goods brought into the port of Bordeaux on a *French* ship, deposited in a customs warehouse and subsequently seized, were condemned on the ground that they were not entitled to the protection of Article 2 of the Declaration of Paris since that article exempts from capture enemy goods only when they are being transported on a *neutral* vessel. 27 *Rev. Gén.* (1920), *Jurispr.* 96.

[2] Decision cited by Huberich in 18 *Columbia Law Review*, 522.

Gothland[1] the question was presented to the British Prize Court as to whether Article 2 of the Declaration of Paris protects enemy goods on a vessel flying the flag of a State allied with the captor State (in this case it was a Belgian ship). Sir Samuel Evans condemned the goods on the ground that Article 2 was intended to protect enemy goods only when they were found on a *neutral* ship. There was no authority, he said, for the proposition that the ship of an ally could be treated as a neutral ship. In the course of this judgment he said:

"The question has been raised in the course of this war as to the position of goods laden on ships belonging to this country. I decided very early that if they were goods belonging to enemy merchants they were nevertheless confiscable. The point was decided by this Court in several cases, and ultimately came before the Privy Council on appeal in the case of the *Woolston*. The decision of the Privy Council was that the goods were not protected. If the goods of an enemy merchant laden on a British ship are subject to confiscation, I say that none the less are the goods of an enemy merchant laden upon an allied ship liable to such condemnation."

The Italian and Russian prize regulations, like those of France, expressly declared that goods on board a vessel flying a national or allied flag were liable to seizure and condemnation.[2]

Sec. 243. Article 2 Protects Enemy Goods Only When Actually Under Neutral Flag. British Decisions. This question came before the Prize Court at Colombo in the case of the *Dandolo and Caboto*.[3] In this case enemy goods had been brought to Colombo on two neutral ships, trans-shipped into lighters and deposited in warehouses in the port, where they were subsequently seized as "maritime prize." It was argued, *inter alia*, by the claimants that the goods having been brought in under a neutral flag they were protected against capture by Ar-

[1] V Lloyd 39; II Br. & Col. Pr. Cas. 293. To the same effect see the *Rubonia*, where enemy goods shipped on an allied ship (Russian) and seized by the customs officials in a South African port, were condemned. (So. Afr. cases, 67.)

[2] French *Instructions*, 1916, Art. 24; Italian Rules of March 25, 1917, Art. 10; Russian Ukase, August 10, 1915. The Italian Commentary on the Rules of 1917 (Fauchille et Basdevant, *Jurispr. Ital.*, *Annexe*, p. xlviii), remarks that among the goods liable to capture article 10 mentions expressly enemy goods on board national or allied ships and those on board confiscated neutral ships; that the immunity of enemy goods on board neutral ships having as its sole foundation the consideration due to a neutral flag, it is logical that the immunity should cease when the ship is confiscable; but, on the other hand, it is opportune to affirm the right of capture in all cases of enemy goods on board ships which by their flag are subject to Italian jurisdiction on those upon which Italian jurisdiction may, at least for certain purposes, be exercised in consequence of the circumstances of the war" [i.e., all ships of an allied power].

[3] II Br. & Col Pr. Cas. 339. See also Sec. 154, *supra*.

ticle 2 of the Declaration of Paris. The Prize Court, however, condemned them on the ground that the protection conferred by Article 2 extended only to enemy goods when they were actually under a neutral flag and not to those which had been freely parted with by the neutral ship carrying them, brought into a port of the captor State and placed in a bonded warehouse. In the course of its judgment interpreting the purpose and scope of Article 2 the Prize Court said:

"With regard to the second point. Prior to the Declaration of Paris, England had always asserted the right to seize enemy goods on the seas wherever they were found, and whether in neutral ships or not. By the Declaration England gave up part of the right she had formerly insisted on, and agreed that in the future the neutral flag should cover enemy's goods, with the exception of contraband. This was a concession, not to the enemy, but to neutrals; and the preamble to the Declaration shews that it was for the purpose of international comity, and for the purpose of avoiding disputes between the belligerents and neutral States that the rule was made. The protection of the neutral flag, in my opinion, can only extend to protect enemy goods when actually under that flag, and if they have been freely parted with by the neutral ship and are afterwards seized, either afloat or ashore, on the high seas or in an English port, they are liable to condemnation as prize. In the present case they might have been seized as soon as they were trans-shipped into the English lighters, and they remained liable to seizure as long as they remained in the customs warehouse in port."[1]

This interpretation was approved by Sir Samuel Evans in the case of the *Batavier II* and the *Batavier VI*.[2] Here non-contraband enemy goods had been landed from two neutral ships (Dutch) at the port of London before the outbreak of war, and deposited in a warehouse where they were subsequently seized. Sir Samuel said he was not bound by the decision of the Prize Court of Colombo in the case of the *Dandolo* and *Caboto* but he approved it and accordingly condemned the goods. "These goods," he said, "no doubt had been under a neutral flag; but they were no longer under a neutral flag at the time of seizure, nor at the outbreak of war, as I understand, and therefore no difficulty arises, in my opinion, under the Declaration of Paris."

[1] Verzijl (*Grotius Annuaire International pour 1917*, pp. 74-78) criticizes this decision as "showing more clearly still the curious fashion in which the English courts sometimes apply the rules of international law" and as a "remarkable example of a total lack of logic." In order to establish the jurisdiction of the Prize Court, he says, the Court was obliged to suppose that the goods were on board ship, but at the same time it annulled this fiction by holding that the neutral flag did not cover the goods because they were not in reality on board the ships.

[2] VI Lloyd 392; III Br. & Col. Pr. Cas. 432.

The same conclusion was reached by Sir Samuel in the case of the *Bergenhus*[1] where enemy goods had been discharged from a Danish ship in an English port. "I am of opinion," he said, "that the goods were enemy property and although they were entitled to protection while under a neutral flag, that protection ceased when the flag no longer covered the goods."

Sec. 244. The Same (Continued). French Interpretation. The French Prize Council adopted a less rigorous view and refused to condemn *non-contraband* enemy goods landed from neutral ships and seized in French ports. In the case of the *Almazora No. 1*[2] certain enemy owned parcels of hosiery which had been brought into the port of Cette on a neutral vessel (Spanish) and subsequently seized on the wharf, were released by the Prize Council on the ground that they were entitled to the protection of Article 2 of the Declaration of Paris, the wharf of a port being regarded as a "prolongation" of the ship transporting them and the goods being entitled to a continued benefit of the *régime* under which they were placed when laden on the ship. Among the *considérants* of the opinion was the following: "These parcels are not embraced among the articles of contraband of war and hence they are entitled to the same benefit on the debarkation wharf as upon the neutral ship which transported them, of the dispositions of the Declaration of the Congress of Paris of April 16, 1856, to the effect that the 'neutral flag covers enemy goods with the exception of contraband of war.'"[3]

Sec. 245. Article 2 Does Not Protect Enemy Goods Trans-shipped from an Enemy to a Neutral Vessel During War. This question came before the British Prize Court at London in June 1916 in the case of the *Jeanne and Other Vessels*.[4] Here a cargo of rice (conditional contraband) belonging to German buyers had been shipped before the war on a German vessel (the *Neuenfels*) and consigned to German ports. Upon the outbreak of war the ship took refuge in a neutral port (Vigo, Spain) where the cargo was trans-shipped into four neutral vessels and consigned to a merchant in Sweden. The cargoes having been seized by the British customs authorities the Crown asked for their condemnation on the ground that they were enemy property and that even if they were protected by Article 2 of

[1] VII Lloyd 111.
[2] 27 *Rev. Gén.* (1920), *Jurispr.* 72.
[3] But those parts of the cargo which were contraband were condemned.
[4] V Lloyd 293; II Br. & Col. Pr. Cas. 227.

the Declaration of Paris (which was not admitted) no one had appeared to claim that protection. Sir Samuel Evans condemned the cargoes as being enemy goods and not entitled to the protection of the Declaration of Paris. Regarding the effect of the trans-shipment from an enemy to neutral vessels, he said:

"There never was any genuine transfer of the property in the goods from the enemy owners or merchants to Tycho Roberg. The Scandinavian vessels really were in the position of vehicles which had been employed by the agent for the enemy, and used for the purpose of completing the transit of the goods to the German ports. In my opinion, when the goods were seized upon these four Scandinavian ships, they were still enemy goods and still in transit, and the neutral ships had been incorporated into the service of the enemy just as much as if the ship, the *Neuenfels,* had got nearer to port and had used these ships as lighters in waters which were possibly not deep enough for the *Neuenfels* to go through. That being so, I need not trouble any further with any questions which might arise with regard to the effect of the Declaration of Paris."

And he concluded:

"The enemy owners of the property have not appeared here at all. They do not appear to make any claim that the goods were protected by the Declaration of Paris. In the claim which was put forward by Tycho Roberg he claimed the goods as a neutral—neutral goods on neutral ships—and there is no reference to the Declaration of Paris in the claim which he put forward, and no protection was sought by him on the ground of that international agreement. If it had been sought on this ground, I should have come to the conclusion that the Scandinavian vessels had so identified themselves with the enemy by taking a trans-shipment of the goods (not bought and sold in the ordinary course of business) in order to continue the transit, that no protection could be given to them, or was ever intended to be given to them, under the Declaration of Paris."

Sir Samuel seems not to have based his decision on the fact that the goods were contraband of war (he made no reference to their contraband character in his judgment) and therefore not entitled to the protection of the Declaration of Paris but rather upon the fact that he Declaraion of Paris does not protect goods trans-shipped from an enemy to a neutral vessel in the course of a voyage. The opinion of Sir Samuel has been criticized as a confusion of two separate questions: [1] the nullity

[1] Verzijl, *op. cit.*, p. 580. See also his article in the *Grotius Annuaire Internat., 1917*, p. 77, and the criticism of Colombos, *op. cit.*, p. 166. See the somewhat similar cases of the *La Palma* and *Beira* (So. Afr. cases, 93), where enemy goods were trans-shipped from enemy to neutral vessels while in a neutral port of Portuguese West Africa and were subsequently seized by the customs officials in a British South African

of transfers of property *in transitu* and the trans-shipment of cargoes during a voyage, as appears from the subsequent case of the *Bawean*.[1] In this latter case a German vessel (the *Kleist*) having on board a cargo of tea consigned to a firm in Germany took refuge on the outbreak of war in the neutral port of Pedang (Sumatra). Subsequently, a year and nine months later, the tea was sold to a Dutch firm and was trans-shipped into a Dutch vessel (the *Bawean*) and consigned to the order of the Dutch buyers in London. On arrival in London the tea was placed in a customs warehouse where it was seized and proceedings begun for its condemnation by the Prize Court. Sir Samuel Evans condemned the goods on the ground that when goods are shipped they retain their enemy character until they reach their destination and cannot be trans-shipped from an enemy to a neutral vessel with a changed destination so as to defeat the rights of a belligerent. Further, that even if they were originally protected by the Declaration of Paris, the protection ceased when they were discharged from the neutral ship. The intention of the original German owners, he thought, was the natural one of "saving something from the burning" by transferring the goods to neutral purchasers. The object of both them and the Dutch purchasers who trans-shipped the goods to a neutral vessel was to defraud belligerents of their lawful right of capture. It was quite clear, he added, that according to an established rule of Prize Law no such transfer and trans-shipment could be made.[2] Regarding the protection afforded by the Declaration of Paris Sir Samuel said:

"One other circumstance must be adverted to—Mr. Bevan contended that he was entitled to some protection because the goods were under the Dutch flag. In my view of the case the Declaration of Paris does not apply; but in any event, in the circumstances of this case, the Dutch flag had ceased to protect these goods. They were in port at the time they were seized, and according to previous judgments in this Court, if the Declaration of Paris ever was a protection to this vessel (and I have expressed my opinion that it was not) it had ceased to have any such effect at the time the goods were seized in port, after they were discharged from the Dutch ship."

port. The goods were held to be not entitled to the protection of the Declaration of Paris and were therefore condemned.

[1] VII Lloyd 113; II Br. & Col. Pr. Cas. 116.

[2] Throughout Sir Samuel's opinion the words "transfer" and "trans-shipment" are interchangeably used in such fashion as would seem to justify the criticism of Verzijl that he failed to distinguish between the transfer of property *in transitu* and the trans-shipment of cargoes from one vessel to another.

Sec. 246. The Same (Continued). In the case of the *Vesta, Castor* and *Titan*[1] the facts were substantially the same. In July 1914 a quantity of magnesite owned by a predominantly German company incorporated in the Netherlands was shipped on a German vessel (the *Naxos*) which upon the outbreak of war took refuge in the neutral port of Lisbon. While there the cargo was sold to a Dutch company and subsequently trans-shipped to the Dutch steamers mentioned above and sent forward to the Netherlands Over Sea Trust as consignees. During the course of the voyage the cargoes were seized by the British naval forces and the Crown asked for their condemnation. The claimants argued that even if the property had not passed to the neutral purchasers at the time of seizure they were immune from capture under the terms of Article 2 of the Declaration of Paris. They asserted that Sir Samuel Evans' statements in the cases of the *Jeanne* and the *Bawean* that goods trans-shipped from an enemy to a neutral vessel are not protected by the Declaration of Paris, were *dicta* because the goods on the *Jeanne* were contraband, whereas those in the present case were not and that furthermore the goods in the case of the *Bawean* were seized in a warehouse while those in the present case were captured at sea. Lord Sterndale, however, condemned the goods on the ground that the transfer to the neutral purchasers was not absolute and complete. The argument of the claimants based on the Declaration of Paris was passed over in silence. Upon appeal,[2] the Judicial Committee reversed the judgment of condemnation for the reason that in the opinion of their Lordships the property in the cargo had in fact passed to the neutral claimants at the time of seizure. Regarding the protection of the Declaration of Paris, Lord Sumner said:

"Had the claimants failed to establish their title, an argument was to have been submitted to their Lordships, which was admitted before the President, that if the ore had not become neutral property it remained enemy property and was being carried under a neutral flag to a neutral country without ulterior destination of any kind. Accordingly the Declaration of Paris was to have been invoked. It appears to have been overlooked that the claimants could only use this argument, after their own title to independent rights had been negatived. They never purported to have merely bought the enemy owners' right or chance of escape. They could not claim on behalf of the enemy owners, if the enemy owners could not claim for themselves, and if the enemy owners were competent to claim

[1] X Lloyd 106; III Br. & Col. Pr. Cas. 716.
[2] X Lloyd 126; III Br. & Col. Pr. Cas. 897.

for themselves, they should have entered an appearance and have done so. . . . Their Lordships have already decided that ownership claims on appeal must be made by appellants who come before the Board as owners. It follows that, if this point had arisen for decision, the claimants would have failed upon the preliminary ground that it was not available to them."

The Judicial Committee thus avoided the necessity of deciding the question whether the goods were entitled to the protection of the Declaration of Paris or not.

Sec. 247. Article 2 Does Not Protect Enemy Goods Under Neutral Flag if "Infected" by Presence of Contraband. In the case of the *Kronprinsessan Margareta and other vessels*,[1] parcels of coffee had been shipped by a German firm at Santos, Brazil, on a neutral ship and consigned to a company in Sweden. Upon being captured by a British warship, condemnation of certain of the parcels was sought, on the ground that they were ultimately intended for Germany. Condemnation of other parcels was demanded on the ground that although there was no evidence of enemy destination they should be condemned for the reason that they were "infected" by the presence of other contraband goods. They were condemned by Lord Sterndale on the ground that "innocent" goods which have become "infected" are not protected by the Declaration of Paris, and the judgment was affirmed, on appeal, by the Judicial Committee.[2] Regarding the purpose of the Declaration of Paris and especially its effect on the doctrine of infection, Lord Sumner said:

"Two other arguments are chiefly relied on. The first that the rule as to infection has been virtually abrogated by the Declaration of Paris; the second, that the rule as to transfers of goods while at sea and without delivery is inconsistent with modern mercantile practice, and therefore ought no longer to be followed. Their Lordships will, of course, pay every possible regard to such an instrument as the Declaration of Paris, but it is necessary to point out exactly what, in this connection, its provisions were. A neutral flag protects enemy goods from capture as enemy goods; in a neutral bottom enemy goods are placed on the same footing as neutral goods. The Declaration, however, is not a charter of immunity in all circumstances for enemy goods under a neutral flag, nor does it protect goods simply as being enemy goods, which, if neutral, would have been liable to condemnation. The Declaration says nothing about the criteria by which the enemy or neutral character of goods is to be determined; it says nothing about the doctrine of 'infection'; it says nothing about the admissibility or rules of evidence; it says nothing of the rights of a belligerent to repress traffic in contraband of war, or of the modes by

[1] VIII Lloyd 189; III Br. & Col. Pr. Cas. 486.
[2] VIII, *ibid.*, 241; III, *ibid.*, 803.

which Courts of Prize give effect to and protect those rights. It is said that the grounds on which so-called 'paper transfers' of property at sea are disregarded have no application in the present case, for the goods, even in the cases where they were enemy property when shipped, were covered by the neutral flag and not even potentially capable of being made good prize, and have since been transferred in good faith and in the ordinary way of trade. The answer is simple. They were capable of being made good prize, even though they were enemy goods in a neutral bottom, for if they were contraband, being in a common ownership with contraband when seized, nothing in the Declaration of Paris either expressly or impliedly protected them."

Sec. 247a. Declaration of Paris Protects Both Neutral Shipowner and Enemy Owner of Goods. In the case of the *Dirigio and other vessels*,[1] the Attorney-General argued that under the Declaration of Paris non-contraband enemy goods on a neutral vessel are free from *capture* at sea but not from *condemnation* by the Prize Court, if the ship has been brought in for other legitimate reasons and the goods have been seized. The object of Article 2, he contended, was the protection of neutral shipping by exempting neutral vessels from search for enemy property; consequently the only persons who could complain of an infringement of the Declaration was the neutral shipowner whose vessel had been searched or seized. The enemy owner of the goods could not therefore invoke the protection of the Declaration. He further contended that the exception of contraband of war from the protection of the Declaration, covers goods which *in their nature* are contraband, and in order to bring goods within that exception it is not necessary that they should have an *enemy destination*. This somewhat novel contention was rejected by Lord Sterndale, who pointed out that as neutral vessels are already subject to search and as enemy goods may still be seized on them, it was difficult to see what advantage would be gained by the argument advanced. Referring to the dictum of Lord Parker in the case of the *Hakan*[2] that "it should be observed that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture unless it consisted of contraband goods," Lord Sterndale said he entirely agreed with it. If, he added, the contention of the Crown were right, a great number of orders made by Sir Samuel Evans and himself, in which, under the Reprisals Order, enemy property had been detained instead of condemned, were

[1] VIII Lloyd 395; III Br. & Col. Pr. Cas. 439.
[2] V Lloyd 186; II Br. & Col. Pr. Cas. 479.

wholly wrong, yet these detentions had been ordered at the instance of the Crown. Lord Sterndale continued:

"The contention seems to me to be opposed to the plain words of the Declaration of Paris. In order to accept it, the words must be read something in this form: 'the neutral flag covers enemy goods so far as concerns the interest of the neutral shipowner.' I can find no such limitation. There may, of course, be a practical difficulty in the enemy owner appearing to assert his rights, but that difficulty is dealt with by Lord Parker in the passage which I have already read from the *Hakan*.

"The contention also seems to me to be entirely contrary to the history of the matter. This is shortly stated in Hall's *International Law* (7th ed., pp. 751 ff.), and shows that the whole dispute was whether enemy goods on neutral ships should or should not be liable to seizure. The Declaration of Paris, by its preamble, states that it was intended to settle the long-standing dispute, and it could only be settled by an agreement that such goods should or should not be so liable. In my opinion the meaning is that such goods should be exempt from seizure; and if such were not the meaning, I can see no practical use in the Declaration at all. I am told that the point was argued before the late President in a case in which judgment was not delivered, but until that time it does not seem to have occurred to anyone.

"Assuming, therefore, that these goods still remained enemy property, no order of condemnation can be made, as I have found that they have not an enemy destination, and therefore did not fulfil the condition that would make them contraband. I do not accept the argument that, to make them contraband under the Declaration of Paris, it is sufficient that they should be on the list of conditional contraband. If the condition be not fulfilled they are not contraband."

Sec. 248. Does the Declaration of Paris Protect Enemy Public Property Under Neutral Flag? Article 2 of the Declaration speaks of "enemy's goods" under a neutral flag; does this embrace only private enemy property or does it also include property belonging to the enemy State? This question came before the Austro-Hungarian Prize Court in the case of the *Kephallonia*[1] which involved the liability to capture of certain goods belonging to the Montenegrin government and captured by the Austro-Hungarian naval forces on a neutral steamer (Greek). The Prize Court held that the goods although the property of an enemy government were protected by the neutral flag.

Sec. 249. Are Owners of Non-Contraband Enemy Goods Destroyed on Neutral Ship Entitled to Indemnity? Such goods when found under a neutral flag are exempt from capture

[1] *Normal Verordnungsblatt für die K. u. K. Kriegmarine*, April 30, 1917 (Stück, 14), p. 204.

under Article 2 of the Declaration of Paris. Suppose the ship is sunk by the captor; is the owner of the goods entitled to compensation for his loss? This question came before the German Prize Court in a number of cases and it held that where the sinking of the neutral vessel was legally justified (*gerechtfertigterwise zerstört*) as where it was transporting contraband the quantity of which constituted more than half the total cargo and which was therefore liable to confiscation and consequently to destruction in the presence of "exceptional necessity," neither the enemy or neutral owners of innocent goods thus lost were entitled to compensation or damages.[1] But where the destruction resulted from the *illegal* sinking of a ship an indemnity was allowed.[2]

Sec. 250. Relation of Article 2 of Declaration of Paris to Article 43 of Declaration of London. The protection afforded by Article 2 of the Declaration of Paris to neutral goods on an enemy ship does not, by its express terms, apply to contraband of war. But Article 43 of the Declaration of London provides that "if a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation." Does this article protect from condemnation contraband goods belonging to an *enemy* under the circumstances mentioned? This question came before the Prize Court at London in the case of the *Sörfareren*.[3] Sir Samuel Evans held that it did not. The Declaration of Paris, he said, excepted contraband of war from the protection agreed to be afforded to enemy goods on neutral vessels and to neutral goods on enemy vessels even when the contraband goods were neutral property. "The aim and object of these articles of the Declaration of Paris," he continued, "were the safeguarding in favor of neutrals of their shipping and their property, other than contraband of war." As to Article 43 of the Declaration of London, it was never intended, he thought, that it should save from condemnation contraband belonging to the *enemy*, but only to protect neutrals whose goods were being carried at sea when their owners were unaware of the declaration of contraband, by

[1] See notably the case of the *Mineral No. 2* (I *Entsch.* 292). It is hard to reconcile this decision either with the letter or spirit of the Declaration.

[2] Cases of the *Villareal* (II, *ibid.*, 317), and the *Papelera* (I, *ibid.*, 334). For further discussion of this matter see below, Sec. 474, *infra*.

[3] IV Lloyd 174; I Br. & Col. Pr. Cas. 589. See further on this point Sec. 439, *infra*.

awarding them compensation on condemnation of their goods which were in fact, although not with their knowledge, contraband at the time of capture. This, he thought, was "an intelligible extension in favor of neutrals of the provisions in their favor in the Declaration of Paris."

The same conclusion was reached by Sir Samuel Evans in the case of the *Rijn*,[1] where he said it was clear from the terms of Article 43 that it was only intended to comprehend neutral ships and cargoes, i.e. neutral ships innocently carrying cargo which turned out in fact to be contraband, and to neutral cargoes which were in fact contraband but which were innocently laden and carried on neutral ships. If, he said, the cargo was contraband, both the enemy ship carrying it and the cargo to whomsoever it belonged, would be subject to capture and condemnation, and an enemy cargo on a neutral ship would also be similarly subject, notwithstanding the Declaration of Paris. The judgments in both cases were affirmed by the Judicial Committee.[2]

III

Departures from the Declaration of Paris by Reprisals Measures

Sec. 251. Reprisals Measures of Great Britain and France. During the first seven months of the war the provisions of the Declaration of Paris were fairly well respected by the belligerents although, as pointed out above, the immunity established by Article 2 was strictly interpreted, especially by the British Prize Courts which in some cases denied it when perhaps the spirit at least of the Declaration required its being accorded. But by an Order in Council issued by the British government on March 11, 1915, and by a decree of the French government promulgated on March 13 of the same year, measures were put into effect which admittedly constituted grave infringements upon the Declaration. These measures were adopted as retaliatory acts against Germany in consequence of her methods of submarine warfare, and, in general, their purpose was to prevent all goods from entering or leaving Germany.[3] All goods destined

[1] VI, *ibid.*, 181; II, *ibid.*, 507.
[2] The *Sörfareren*, IV Lloyd 196; the *Rijn*, VI Lloyd 208.
[3] The purpose and effect of these measures are discussed in my *International Law and the World War*, Vol. II, pp. 319 ff.

to a German port were required to be discharged in a British port (or French port) where they would be put into the custody of the Prize Court and if not contraband and if not requisitioned would be restored by order of the Court "upon such terms as the Court might in the circumstances deem to be just to the person entitled thereto." Goods coming from a German port were to be similarly dealt with, except that they would be detained or sold and the proceeds dealt with as the Court might direct.[1] Portugal adopted similar measures (August 14, 1916), but none of the other allies followed the examples of the three governments mentioned.

The British Order of 1915 was followed by another on January 10, 1917, defining more precisely the terms "enemy destination," "enemy origin" and "enemy property," and by the still more rigorous Order of February 16, 1917, issued in retaliation against the German war zone decree of February 1, 1917, which was declared to be "in flagrant contradiction with the rules of international law, the dictates of humanity and the treaty obligations of the enemy." By the terms of the latter Order all vessels encountered at sea on their way to or from a port in any neutral country affording means of access to enemy territory, without calling at a British or allied port should, until the contrary was established, be declared to be carrying goods with an enemy destination or of enemy origin and should be brought in for examination, and, if necessary, for adjudication by a Prize Court. Goods found to be of enemy origin or destination would be liable to condemnation. None of Great Britain's allies followed her example in this respect.

Sec. 252. Justification by the Prize Court. Case of the "Leonora." The circumstances which in the judgment of the British Prize Court justified the retaliatory measures of 1915 and 1917 were thus recapitulated by Sir Samuel Evans in the case of the *Leonora*.[2]

"Before approaching the questions of the construction, effect, and validity of the Order in Council [of 1917], it is, in my view, essential to examine and keep in mind the circumstances—exceptional, and, indeed, unique in their character—which led up to its promulgation. Its basis was retaliation, and its object was the restriction of the commerce of the enemy. It was intended to be, and was by its express terms stated to be, supplemental

[1] The text of the British Order in Council may be conveniently found in Supp. to Vol. IX of the *Amer. Jour. of Int. Law*, p. 110. An English text of the French decree may be found on p. 113 (*ibid.*).

[2] VII Lloyd 262; III Br. & Col. Pr. Cas. 181.

to an earlier Order in Council of March 11, 1915, which was similarly based, and had the same object.

"It is therefore necessary to go back to ascertain the origin and operation of the first Order.

"In the first week of February, 1915—I think on February 4—the German government issued an official declaration that the English Channel, and north and west coasts of France, and all the waters round the British Isles would be treated as a 'war area,' and that all enemy ships, whatever their character, found in that area would be destroyed, and neutral vessels would be exposed to danger.

"Even before this the enemy had shown how they were prepared to treat vessels belonging to their adversaries, whatever the class or omission of such vessels might be. Near the end of October, 1914, a German torpedo had sunk a French passenger steamer—the *Amiral Gauteaume*—with more than 2,000 unarmed refugees on board, including a large proportion of women and children. By good fortune a British steamship, happening to be near, succeeded in rescuing most of the passengers, but a considerable number lost their lives.

"The declaration by Germany of the 'war area' already referred to was communicated by this country to all the important neutral countries (including, of course, Holland and Sweden), in a Note dated March 1, 1915. The Note commented upon the declaration, and also foreshadowed the retaliatory measures which would be adopted, and were afterwards incorporated in the Order in Council of March 11, 1915.

"Then followed in due course the first Order in Council as a retaliatory order. It recited that the German government had issued certain Orders which in violation of the usages of war purported to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels would be destroyed, irrespective of the safety of the lives of passengers and crews, and in which neutral shipping would be exposed to similar danger in view of the uncertainties of naval warfare, and had warned neutrals against entrusting crews, passengers or goods to British or allied ships.

"It contained further recitals to the effect that the enemy's conduct gave to this country an unquestionable right to retaliation; that His Majesty had therefore decided to adopt measures in order to prevent commodities of any kind from reaching or leaving Germany, but that such measures would be enforced without risk to neutral ships or to neutral non-combatant life, and in strict observance of the dictates of humanity; and that the object of such measures was to restrict the commerce of Germany.

"To revert to the history of the enemy's conduct at sea after the declaration of February, 1915, the German authorities lost no time in carrying into effect their threats. Their submarines sank British ships and destroyed lives of innocent persons in March. In April they sank Dutch, Swedish, and Portuguese ships (Portugal at that time being neutral). They also torpedoed a Belgian relief ship without warning and sank her in five minutes, causing the loss of 17 lives—although it was in the daytime and the vessel was flying the Belgian Relief Commission's flag and displaying the Commission screens on both sides, marked 'Commission Belgian Relief, Rotterdam,' in letters over 2 ft. high; and had actually been granted a safe conduct by the German Consul at the Hague.

"And it will be remembered—can it ever be forgotten?—that on May 7

the *Lusitania* was torpedoed and sunk when she was carrying nearly 2,000 persons of all classes and ages, and that in the frightful disaster 1,198 men, women, and children were drowned. No more callous or cruel crime has been committed since the day of Cain. The first murderer seemed, however, to have felt some shame and remorse, as he denied the crime at the outset, and afterward moaned that his iniquity was more than could be forgiven. But the authors and instigators of the inhuman, fiendish atrocity of the *Lusitania* were such beings as could rejoice and revel in it. Lest the civilized world, which stood aghast at the crime, might misunderstand or forget it, they struck a medal of a vile kind to celebrate and commemorate it, replicas of which were sent to neutral countries in proud proof of their prowess.

"This being the attitude of the enemy, it is not to be wondered at, therefore, that through 1915 and 1916 the outrages continued. Nay, further, in the beginning of 1917 the severity of the submarine atrocities was to be increased, and a formal announcement of an almost unlimited submarine warfare in European waters was made by a Memorandum of the German government, which was expressly directed against 'all sea traffic.'"

Referring to the German measure as one which interfered with neutral shipping and commerce and which disregarded innocent human life, Sir Samuel continued:

"This called forth the second retaliatory Order in Council now under consideration. It recited (*inter alia*) that the enemies' proceedings rendered it necessary for His Majesty to adopt further measures in order to maintain the efficiency of those previously taken to prevent commodities of any kind from reaching or leaving the enemy countries, and for that purpose to subject to capture and condemnation both the vessels carrying goods with an enemy destination or of enemy origin, and the goods themselves unless the vessels afforded to the forces of this country and its allies ample opportunities of examining their cargoes. It then set forth its cardinal provision that such vessels and goods should be liable to capture and condemnation. It also contained a clause that the Order was supplemental to the Order in Council of March 11, 1915, and an intermediate one of January 10, 1917, for restricting the commerce of the enemy."

Sec. 253. Validity of First Reprisals Order Upheld by the Prize Court. Right of Retaliation. Case of the "Stigstad." The validity of the Order in Council of March 11, 1915, was attacked in the case of the *Stigstad*,[1] a Norwegian vessel which in the month following the issue of the Order, sailed from a Norwegian port for Rotterdam with a cargo of iron ore which was to be trans-shipped there to Rhine barges for transport to Germany. The vessel was captured by a British war ship and taken into a British port where the cargo was sold by arrangement between the Crown and the shippers. The shipowners

[1] V Lloyd 361; II Br. & Col. Pr. Cas. 179.

claimed a reasonable sum for freight and for expenses on account of the detention of the vessel. Counsel for the claimants denied the validity of the Order in Council on the ground that it constituted an encroachment upon the rights of neutrals as laid down by the Declaration of Paris and was not therefore binding on the Prize Court. In rejecting this contention Sir Samuel Evans said:

"The Order in Council was issued, as the preamble states, as a retaliatory or reprisal order and, according to the decision given recently by the Privy Council in the case of the *Zamora*, any Order in Council authorizing reprisals will be conclusive as to the facts which are recited as showing that cause for reprisals exists. I need not read the preamble. It is enough for me to say the preamble says that cause has arisen for reprisals, and the facts recited therein are conclusive according to the decision of the Privy Council as showing that a case for reprisals exists.

"It has been argued by Mr. Dawson Miller that the Order in Council is unlawful because it entails upon neutrals a degree of inconvenience. Any interference with the trade of the belligerents, in so far as that trade is exercised by the ships of neutrals, must necessarily cause inconvenience. In the case of contraband, and particularly in the case of a breach of blockade, the inconvenience to neutrals is very great. It has been pointed out already in public, and I may as well repeat it here, that the Order in Council, if it be a lawful order, deals very gently with neutrals engaged in trade which this country thinks it has a right to try to stop; because, whereas in the case of a breach of blockade, or of an attempt to break a blockade, there is a complete confiscation of the vessel, nothing of the kind results under the terms of the present Order in Council. All that is done is to take the vessel and her cargo to a British port. The vessel is released, or ought to be released, as soon as what is necessary to comply with the terms of the order as to the discharge of the cargo has been done; and her owners also receive a proper sum in respect of freight. According to the judgment of the Privy Council in the case of the *Zamora*, although the recitals as to the case for reprisals are conclusive, the Court is not actually bound to hold that the means of meeting emergencies by way of reprisals are the best or only means. The Privy Council further declared that no party aggrieved is precluded from contending . . . 'that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case.'

"If I have to express my opinion on that, I express it without doubt, that the means adopted in this Order in Council did not entail upon neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case, and that, therefore, it cannot be said that by reason of those means the Order in Council is in itself unlawful.

"In the result I am of opinion that the Order in Council is lawful, as an order enjoining reprisals, in accordance with the principles of international law. The result, in my opinion, is that whatever delay or inconvenience may inevitably or necessarily be caused, as in this case, neutrals must suffer that delay and that inconvenience as a result of the exercise of legitimate belligerent rights on the part of this country. I repeat that I

should have been glad to have had fuller arguments, and to have had time to refer to authorities and put my reasons into better form; but the matter being so important I think it right that I should express my opinion now that there is nothing invalid in this Order in Council, and that it is an Order which this Court ought to obey."

A reasonable sum for freight was allowed but the claim for expenses on account of the detention of the ship was disallowed.

Sec. 254. View of the Judicial Committee. The judgment of Sir Samuel Evans was affirmed by the Judicial Committee.[1] Lord Sumner speaking for the Committee stated that the question involved was not the right of a belligerent to retaliate upon his enemy the same measure as has been meted out to him, or the propriety of justifying in one belligerent some departure from the regular rules of war on the ground of necessity arising from prior violations on the part of his adversary, but whether neutrals are entitled "to be saved harmless under such circumstances from inconvenience or damage thereout arising." The breaches on the part of Germany, he said, were such as to justify retaliatory measures and the only ground upon which neutral claimants could attack the validity of the Order was that it subjected neutrals to more inconvenience or prejudice than was reasonably necessary under the circumstances. The belligerent government itself was properly the judge of the necessity for resorting to retaliation on account of the misconduct of the enemy; it was, in short, a matter of policy into the expediency of which a Prize Court could not inquire. On this point Lord Sumner said:

"Its function is, in protection of the rights of neutrals, to weigh on a proper occasion the measures of retaliation which have been adopted in fact, and to inquire whether they are in their nature or extent other than commensurate with the prior wrong done, and whether they inflict on neutrals, when they are looked at as a whole, inconvenience greater than is reasonable under all the circumstances. It follows that a Court of Prize, while bound to ascertain, from the terms of the Order itself, the origin and the occasion of the retaliatory measures for the purpose of weighing those measures with justice as they affect neutrals, nevertheless ought not to question, still less to dispute, that the warrant for passing the Order, which is set out in its recitals, has in truth arisen in the manner herein stated. Although the scope of this inquiry is thus limited in law, in fact their Lordships cannot be blind to what is notorious to all the world and is in the recollection of all men, the outrage namely committed by the enemy upon law, humanity, and the rights alike of belligerents and neutrals, which led to and indeed compelled the adoption of some such policy as is

[1] V Lloyd 388; III Br. & Col. Pr. Cas. 347.

embodied in this Order in Council. In considering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs are alike material, for the more gross and universal those wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves. It is right to recall that, as neutral commerce suffered and was doomed to suffer gross prejudice from the illegal policy proclaimed and acted on by the German government, so it profited by and obtained relief from retaliatory measures, if effective to restrain, to punish and to bring to an end such injurious conduct. Neutrals, whose principles or policy lead them to refrain from punitory or repressive action of their own, may well be called on to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas.

"The argument principally urged at the bar ignored these considerations and assumed an absolute right in neutral trade to proceed without interference or restriction, unless by the application of the rules heretofore established as to contraband traffic, unneutral service and blockade. The assumption was that a neutral, too pacific or too impotent to resent the aggressions and lawlessness of one belligerent, can require the other to refrain from his most effective or his only defence against it, by the assertion of an absolute inviolability for his own neutral trade, which would thereby become engaged in a passive complicity with the original offender. For this contention no authority was at all forthcoming."

The seas being "the highway of all," he said, it was inevitable that neutrals who use it in time of war should suffer inconvenience in the exercise of their rights. Belligerency and neutrality were conditions so related to one another that neutrals "must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence." He added:

"To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the heads of contraband, blockade and unneutral service, would be to take away with one hand what has formally been conceded with the other. As between belligerents, acts of retaliation are either the return of blow for blow in the course of combat, or are questions of the laws of war not immediately falling under the cognizance of a Court of Prize. Little of this subject is left to prize law beyond its effect on neutrals and on the rights of belligerents against neutrals, and to say that retaliation is invalid as against neutrals, except within the old limits of blockade, contraband and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect."

In conclusion, their Lordships denied that the Order in Council inflicted excessive hardship either in kind or degree upon neutral

commerce. On the contrary, it might well be said that it was treated under the Order "with all practicable tenderness, since the neutral shipowner was promised a proper price for the service rendered by his ship and the neutral cargo owner compensation for his goods."

The validity of the Order in Council being upheld by the highest prize tribunal, the attacks of claimants in subsequent cases were directed against its application and construction in particular circumstances. Thus in the case of the *Noordam No. 2 and other vessels*,[1] the respondents accepted the validity of the Order but contested its application in the case of certain securities seized on board neutral vessels. Lord Sumner, speaking for the Judicial Committee, thus characterized the nature of the Order and the duty of the Prize Court in applying it.

"The Order in Council is a Reprisals Order—that is to say, His Majesty, in the exercise of his belligerent right, has been pleased upon just and adequate provocation to resort to measures not prescribed by the general existing rules of the law of nations. These measures are of his own selection and are defined in such manner as he thought fit to adopt in the terms of the Order. It is just because neutrals are required to submit to an Order, validly and justly made by way of reprisal, that they must also be held entitled to know from the terms of the Order itself what is the extent and limit of their liability under it. If clear terms are used, their clear meaning must be enforced; if ambiguous terms are used, the belligerent cannot ask to have them extended by construction in his own favour. It rested with those who framed the Order, within the limits of the Crown's right of reprisal, to select and to state the extent of its exercise. It is the duty of a Court of Prize, administering the law of nations, to protect the rights of neutrals in this matter by limiting their obligation to that which the Order itself states, no less than to enforce the obligations which the Order duly creates and clearly declares."[2]

Sec. 255. Validity of Second and Third Orders. Case of the "Leonora." The validity of the Second Order in Council, that of January 10, 1917, which declared that the terms "enemy destination," "enemy origin," and "enemy property" as employed in the Order in Council of March 11, 1915, should be deemed to

[1] IX Lloyd 231; III Br. & Col. Pr. Cas. 488.

[2] The French Prize Council did not, as did the British Prize Courts, discuss the question of the validity or invalidity of the French reprisal decree of March 13, 1915, but proceeded on the theory that the decree was binding upon the Council whether it was in accord with the law of nations or not. As already pointed out (Sec. 135) the Council made no such distinction as the English Judicial Committee did in the *Zamora* case, between legislative acts and executive decrees, but regarded both alike as binding, regardless of their conformity or non-conformity to international law. In fact, it held that the Declaration of Paris was no obstacle to the enforcement of the reprisals decree. The *Almazora*, 27 *Rev. Gén.* (1920), *Jurispr.* 72.

apply to goods destined for, or originating in, or belonging to, any person domiciled in any enemy country, was upheld by Sir Samuel Evans in the case of the *Chumpon and Other Vessels*.[1]

The validity of the Third Order in Council, that of February 16, 1917, was likewise affirmed by Sir Samuel and, upon appeal, by the Judicial Committee, in the case of the *Leonora and Other Vessels*.[2] Here the Crown asked for condemnation of two Dutch and six Swedish vessels which had been captured on voyages from Rotterdam to Sweden and of their cargoes which consisted chiefly of Belgian and German coal and coke. The claimants argued, *inter alia*, that the Order in Council was invalid, for the reason that international law did not permit the condemnation of goods of enemy origin belonging to a neutral. They admitted that a belligerent might be justified by reason of the enemy's violation of the law, in departing from the laws of war, but asserted that he could not in the exercise of the right of reprisal against an enemy violate the existing rights of neutrals as they are defined by the accepted principles of international law. Further, neutrals who are incidentally injured by the execution of reprisal measures are entitled to compensation therefor. They also denied that the practice of reprisals was "recognized *de jure* in international law," one of the great objects of which was to protect neutrals. There were no precedents, they said, in support of the right of retaliation where the effect was to injure neutrals, except during the Napoleonic wars. If the contention of the Crown were right, belligerents might disregard every protection afforded by such Acts as the Declaration of Paris and the Hague Conventions and the only remedy for neutrals would be war, which in the case of small states would be ineffective.

In an elaborate opinion filling 56 pages in Lloyd's Collection, Sir Samuel discussed the arguments of the claimants and justified both in law and policy the Order in Council. Referring to the "supreme importance" of the issue both to belligerents and neutrals and its possible effect upon the proximate, and, indeed, the ultimate fortunes of the war, he said:

"The case for the Crown may be translated into quite simple terms. It was that the *Leonora* was carrying goods of enemy origin from a port in a neutral country, affording means of access to the enemy territory, to a port in a neutral country also affording means of access to the enemy territory; and was therefore liable to capture and condemnation in respect

[1] VI Lloyd 420; II Br. & Col. Pr. Cas. 242.
[2] VII, *ibid.*, 262; III, *ibid.*, 181.

of the carriage of such goods under the Order in Council of February 16, 1917; and that the goods were also liable to condemnation under the same order."

The answer of the claimants was: the Order was illegal and invalid as against neutrals; and therefore the capture was wrongful and neither the vessel nor the goods could be condemned." Sir Samuel thus summarized their contentions:

"(a) That no measure of retaliation by a belligerent for acts of an enemy admittedly committed in breach of international law, or even of the dictates of justice and humanity, is justifiable by the law of nations, if and in so far as it affects neutrals with any inconvenience or loss.

"(b) That no measure for restriction of the enemy's commerce, whether taken by way of retaliation or otherwise, is justifiable by the law of nations, if thereby the trade of neutrals by sea is interfered with to a greater extent than it is by the existing rules relating to contraband, strict blockade, or unneutral service.

"(c) That no such measure is justifiable by the law of nations, unless full compensation for all inconveniences or loss is provided for the neutrals affected as their absolute and unqualified right.

"(d) That neutrals are entitled to carry on their sea-borne trade with the enemy with impunity, whatever breaches of international law he may be guilty of, at any rate if they make a formal protest against his illegal conduct, subject only to the risk involved in carrying contraband, or attempting to break a recognized legal blockade of the enemy's ports or territory.

"(e) That even if some measure of retaliation is allowed by the law of nations which may affect neutral commerce, the Order in Council of February, 1917, is invalid, because it imposes upon neutrals excessive interference, inconvenience and loss.

"(f) That in this particular case as respects the *Leonora* and her cargo, the Order in Council is invalid (1) because the coal was not of enemy origin; and (2) because no port had been appointed to which the vessel could go for examination."

Continuing, he said:

"I shall deal with the last two heads separately later. As to the others, three main questions arise. First, does the Order in Council comply with, or does it offend against, the guiding principles of the law of nations? Secondly, are there any precedents or decisions in favour of or against its validity? and thirdly, is there authority for or against it, apart from actual decision or ruling precedent?

"War between powerful States must act and react not only on the belligerents themselves, but also upon other States that take no actual part in it, and their subjects. When war is carried on by sea, neutrals are naturally more affected in relation to their trade than they are by land warfare. Belligerents who have had supremacy or superiority upon the waters, have insisted progressively and effectively upon their right to bring pressure upon their enemies in proportion to their maritime power. In

the development of the rules of international law touching this right, inevitable conflicts have arisen between belligerents and neutrals as to what kind of acts belligerents were entitled to commit with the aim of defeating or afflicting their adversaries, however much neutral traders might suffer in the process; and as to what neutrals were entitled to do in the exercise of their commerce whatever the results to belligerents might be.

"The object—and the legitimate object of a belligerent—is to destroy or cripple the enemy's commerce. The result—and the invitable result—to neutrals, is interference with their trade. In the application of the principle, the boundary of the law of nations has been extended from time to time to adapt itself to new and ever-changing conditions. This law must from its nature have room for expansion. It cannot, and never could, be squeezed into a mould of a particular size or shape. It never had, or could have, the quality of immutability attributed to the laws of the Medes and the Persians. It could not be confined within artificial limits like an Act of Parliament. It has the essence and qualities of a living organism like the common law of this realm."

After reviewing the law of blockade and contraband at some length, the justification of which, so serious to neutrals, was, he said, the acknowledged right of belligerents to bring pressure upon the enemy by curtailing or stopping his trade, and admitting that there could be no blockade of neutral ports or coasts, Sir Samuel said:

"I now leave the first of the three general main questions, with the expression of my view, that if it is permissible in the circumstances of the present war and in view of the enemy's conduct to allow by way of retaliation any extension of the powers of a belligerent at sea for the restriction of the commerce of the enemy, it does not appear to me that the Order in Council proceeds upon any principle inconsistent with or essentially contrary to those already embodied in the law of nations."

Turning then to the second and third questions, which, he said, could be taken together, namely, whether there were any precedents or decisions or authority in support of or against the validity of the Order, Sir Samuel declared that there was at least no decision against it. After reviewing at great length the Napoleonic precedents, the opinions of Sir William Grant, of Sir John Nicoll, Sir William Scott, Lord Erskine, and Lord Eldon, he observed:

"It is surely significant that, notwithstanding the public discussions and controversies of 1807 and the following years, no decision of the British Court of Prize could be cited against the validity of the Orders in Council. Several cases were decided in the British Prize Court and in the Colonial Prize Courts in 1809 and 1810, which are not reported and which were carried to appeal. In some of them the documents show that the validity

of the Orders in Council was raised and questioned. But in all the appeals the sentences of condemnation were sustained; and in none of them was there a pronouncement against the legality of the Orders. Several of them were decided in March, 1810. The Court then consisted of Sir William Grant, Sir William Wynne, and Sir John Nicholl, except when the appeal was from a vice-admiralty court, when Sir William Scott also formed one of the Court of Appeal."

Continuing his examination of more recent authority, particularly the decision of the Judicial Committee in the *Zamora* case, he concluded:

"For the various reasons which I have given fully and I fear at too great length, I am of opinion that in the circumstances existing in February, 1917, the recognized guiding principles of international law justified an order of retaliation against the enemy with the object of curtailing or throttling his trade, although it prescribed measures outside and beyond the ordinary rules of blockade; that there are good precedents and authority for such an order; and that, if, in view of the whole situation between the belligerents, the means for carrying it into effect are not excessive or unreasonable against the enemy, the consequential results to neutrals desiring or willing to trade with the enemy give such neutrals no right to complain, or to claim compensation.

"Let me add that if such a retaliation was not permissible by the law of nations, it is conceivable that neutral States might, by the exercise of their alleged right to carry on trade with a belligerent without interference, become the actual arbiters of the fate of a disastrous war to which they were not parties, and from which they not only did not suffer loss, but actually achieved gain.

"The points that remain can be dealt with much more shortly. If a retaliatory Order was justified, does the Order in question entail on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case?

"A milder Order had been tried, and for nearly two years. It was, as recited, found to be insufficient for the avowed and legitimate purpose. His Majesty's advisers thought that the new Order of 1917 provided the best or only means of meeting the emergency. The emergency was of the gravest possible character. The object of the perpetrators of the indiscriminate and unlimited depredations of the submarines was to starve these islands by sinking at sight all ships and cargoes, whether neutral or not, and by killing mariners, whatever their nationality. It is sufficiently notorious that the chief advisers of this dastardly and inhuman policy promised the German people that the activities of six or eight months would suffice to bring this country to its knees, or to effect its ruin. To adopt a phrase of 'Historicus,' the German government by these means looked forward to 'creating a terrestrial globe in which the unsymmetrical contour of the British Isles was to be blotted out.'

"Bearing in mind all these facts, I fail to see how it can be said that the Order in Council was not justified as against the enemy; and if so justified, how it can be said that the consequences—inevitable as they were—

thereby entailed on neutrals are unreasonable, or such as to render the Order illegal.

"The first Order did not subject to confiscation the goods or the vessels. The former were to be detained till the end of the war; the latter were left to go free to ply their trade after discharging the goods. It occasions no startling surprise that such an Order was found ineffective against such a determined submarine warfare. When neutral ships were so immune, the enemy's trade, so profitable to owners of ships, was not likely to suffer greatly. The goods of enemy origin or for enemy destination were immovable by sea without the ships. The ships gave life and motion to the trade. If it was right to retaliate by attempting to prevent or destroy the commerce of the enemy, it was necessary that the vessels which engaged in carrying it on to and from the enemy country should come under some disability. A suggestion was made that detention till the end of the war would be sufficient. Who can tell? It may be that it would pay neutrals to have their vessels so detained and saved from the perils of sinking, and to have them delivered up at the conclusion of the war, when they might be of an enormously enhanced value.

"I cannot, by any process of weighing in fine scales facts of which I have far less knowledge than the naval advisers, say what the exact Order or measure of retaliation should be. It is enough to say that, according to the best opinion I can form, the present Order is not excessive as against the enemy or in its effect on neutrals.

"I fail to see how it can be said that the effect on neutrals is excessive or unreasonable when similar disadvantages are imposed upon them in many cases of carriage of contraband, in all cases of violation or attempted violation of blockade, and even in all cases of refusal of or resistance to visit and search.

"I therefore decide against the contention of the claimants that the Order entails unreasonable consequences on neutrals having regard to all the circumstances."

Sec. 256. The Same (Continued). View of the Judicial Committee. Upon appeal,[1] the judgment of Sir Samuel Evans was affirmed and his opinion praised as a "monument of research." Their Lordships, in view of their opinion in the case of the *Stigstad*, did not consider it necessary to "embark on a general re-statement of the doctrine [of retaliation] or a minute reëxamination of the authorities." They limited themselves, therefore, to emphasizing certain basic principles one of which was that there are "certain rights which a belligerent enjoys by the law of nations . . . which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this, because without those rights, maritime war would be frustrated and the appeal to the arbitrament of arms be made of no effect."

[1] VII Lloyd 351; III Br. & Col. Pr. Cas. 385.

"Undoubtedly the right of retaliation exists. It is described in the *Zamora;* it is decided in the *Stigstad,* as it had so often been decided by Sir William Scott over a century ago. It would be disastrous for the neutral if this right were a mere executive right not subject to review in a Prize Court; it would be a denial of the belligerent's right if it could be exercised only subject to a paramount and absolute right of neutrals to be free to carry on their trade without interference or inconvenience. This latter contention has already been negatived in the *Stigstad.* The argument in favor of the former, drawn from the decisions of Sir William Scott, seems to their Lordships to be no less unacceptable. With the terms of the Proclamation and Orders in Council from 1806 to 1812 their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term 'blockade' but discussion of, or at least allusion to, the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was deemed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory Order. In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights which the law of nations recognizes as belonging to belligerents, and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant by them when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question pre-eminently one of fact and degree."

The contention that when a belligerent retaliates upon his enemy, neutrals must be compensated for the inconvenience which they suffer was declared to be inconsistent with the whole theory on which the right of retaliation is exercised. "The right of retaliation is a right of the belligerent, not a concession by the neutral."

The "onslaught" upon shipping generally which the German government carried on sufficiently justified the right of retaliation. The real question here related to the degree of the danger and inconvenience to which the trade of neutrals had been subjected by the enforcement of the retaliatory measures adopted. Lord Sumner, speaking for the Judicial Committee, said in conclusion:

"Their Lordships recall and apply what was said in the *Stigstad,* that in estimating the burden of the retaliation, account must be taken of the gravity of the original offence, which provoked it, and that it is material to consider not only the burden which the neutral is called upon to bear, but the peril from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that

it may be so—that an Order of this severity may never be needed and may therefore never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history; that it menaced and outraged neutrals as well as belligerents; and that neutrals had no escape from the peril except by the successful and stringent employment of unusual measures, or by an inglorious assent to the enslavement of their trade? Their Lordships have none.

"On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted, which this record contains, it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and inconvenience to neutrals in particular cases. Such a conclusion having been established, their Lordships think that the burden of proof shifts and that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for, the matter being one of degree, it is not reasonable to require that the Crown, having proved so much affirmatively, should further proceed to prove a negative and to show that the risk and inconvenience in any particular class of cases were not excessive. Much is made in the appellants' evidence of the fact that calling at a British port would have taken the *Leonora* across a German minefield but it is very noticeable that throughout the case the very numerous instances of losses by German action are cases of losses by the action of submarines and not by mines."

The French Prize Council, as stated above, does not appear to have expressed any opinion upon the validity of the French decree. Its task was the more modest one of determining in particular cases whether under Article 7 of the decree the cargoes diverted belonged to German subjects, whether they came from Germany or whether they were destined thereto.[1] In fact by express terms of the decree this was the only jurisdiction conferred on the Prize Council in connection with its execution.

Sec. 257. Observations on the "Stigstad" and "Leonora" Decisions. The decisions of the British Prize Court upholding the right of a belligerent to disregard the rules of international law by retaliatory measures against his adversary who has in the first instance violated the law and that neutrals whose rights are injuriously affected by such measures cannot complain, were strongly criticized by writers on international law especially in neutral countries, and of course the measures themselves were the subject of protest by neutral governments.[2] So far as the

[1] Compare Verzijl, *op. cit.*, p. 605.

[2] See, for example, an article by Borchard, *Yale Law Journal* (1919), 583 ff., and another by Yntema, 17 *Michigan Law Review*, 64 ff. The latter author criticizes as unwarranted the doctrine that an enemy may be punished by way of retaliation "through the sides of a neutral" and even asserts that non-conformity by one belligerent to the rules of international law

decisions of the Prize Courts are concerned it has been said that under the doctrine of *stare decisis*, a doctrine almost superstitiously followed by the courts of England and America, the British Prize Courts were bound to uphold the right of retaliation since it had been affirmed by the highest prize tribunal (the Lords of Appeal) during the Napoleonic wars.[1] Furthermore it is a principle of English prize jurisprudence that Prize Courts are bound by the recitals in Orders in Council edicting measures of reprisal, which recitals usually allege reasons justifying the retaliation which they enjoin. In other words, the institution of reprisal is a political measure—a matter of public policy—the control of which is beyond the jurisdiction of the Prize Court.

Regarding the legality of retaliation against an adversary who violates the law, when it affects only the enemy it will readily be admitted that it has the sanction both of practice and of legal authority.[2] It is only when the rights of neutrals are incidentally or indirectly affected by such measures that the

does not justify the enemy in disregarding them. See also an article by an English jurist, Thomas Baty, in the *Pennsylvania Law Review* for June, 1915, 717, who, criticizing the Order in Council of March 11, asks, "How, as Phillimore says, can you retaliate against neutrals who have never injured you?" In another place (article entitled "Naval Warfare; Law and License," 10 *Amer. Jour. of Int. Law* 52) Baty remarks that as a consequence of the reprisals Orders the second article of the Declaration of Paris "has followed the Declaration of London into the sphere of ancient history and the neutral flag no longer covers enemy property." Compare also Quigley, "The Immunity of Private Property from Capture at Sea," XI, *ibid.*, 30), who pronounced the attempt to stop all trade with the enemy to have been contrary to the Declaration of Paris. See also the protest of the United States government, letter of the Secretary of State to Ambassador Page, March 30, 1915, *Supp. to IX Amer. Jour. of Int. Law*, 116, and the telegram of July 14, 1915, *ibid.*, 153, where it was declared that "in so far as the interests of American citizens are concerned the government of the United States will insist upon their rights under the principles and rules of international law as hitherto established, governing neutral trade in time of war, without limitation or impairment by orders in Council or other municipal legislation by the British government and will not recognize the validity of Prize Court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law." See also the American note of October 21, 1915, X, *ibid.*, 73 ff.

[1] Sir Erle Richards in an article entitled "British Prize Courts and the War," published in the *Br. Yr. Bk. of Int. Law*, 1920-21, p. 29, says the discovery of this decision was made only during the late war and "it seems never to have occurred to any of the writers on international law whose business it is to examine the practice of nations that retaliation against neutrals had been finally accepted as a legal right by the highest judicial authority in Great Britain." It was known, he says, that Lord Stowell had upheld the retaliatory orders during the Napoleonic wars and that Napoleon had claimed the right to retaliate in his decrees.

[2] See the authorities cited in my *International Law and the World War*, Vol. II, p. 322, note 1. See also a letter of the Rt. Hon. A. J. Balfour in the London *Times* of April 2, 1915, and an article by Professor Wilkinson entitled "Reprisals in War" in the *Law Magazine and Review* for May, 1915.

exercise of the right raises controversy. On the one side, it is said that it is not within the legal right of any one or two belligerents in the exercise of their power against the other to over-ride a rule of law which has been established or become generally recognized by the whole body of States for the protection of neutrals. It is no answer to say that the offence lies with the first belligerent who disregards the rule; that the neutral has no right of complaint except against him and that his remedy consists in resistance to the measures of the original offender. In the first place, the ability of the neutral to enforce his remedy against a powerful offender may be wholly lacking, and in the second place, if he had the power, it might not always be easy for him to determine who was in reality the original offender. The original blame must be first established and the onus of determining it would be thrown upon the injured neutral. Usually when measures of reprisal are proclaimed by belligerents each, as stated above, begins by a recital of breaches committed by his enemy (see e.g. the preambles of the British Orders in Council and the German decrees) and ordinarily it is difficult for the neutral to determine where the original responsibility lies.

On the other hand, it is emphasized that a belligerent cannot be compelled to fight at a disadvantage; that if his adversary repudiates the generally accepted rules of war, the opposing belligerent cannot be held to a strict observance of them; that if the rights of neutrals suffer from the infringement the responsibility is upon the original offender and it is for them to insist upon, and compel, if necessary, observance by him of the established rules.

The Rt. Hon. A. J. Balfour thus stated the British case in a letter to the London *Times* of April 2, 1915:

> "Put shortly, the case is this. The Germans declare that they will sink every merchant ship which they believe to be British, without regard to life, without regard to the ownership of the cargo, without any assurance that the vessel is not neutral, and without even the pretence of legal investigation. The British reply that if these are to be the methods of warfare employed by the enemy, the Allies will retaliate by enforcing a blockade designed to prevent all foreign goods from entering Germany and all German goods from going abroad."

To hold, he said, that Great Britain in technically violating the law of blockade in order to meet the measures of an enemy who had openly disregarded the law of nations and of humanity would be to apply rigid technical standards and would

be relying upon the letter of international law and ignoring its spirit.

Opinions will naturally differ as to the merits of the question. It can at least be said that a recognition of the legal right of belligerents to retaliate against one another, when the effect is to over-ride the protection established by international law in behalf of neutrals—a right now clearly affirmed by the highest prize tribunal of Great Britain, puts it within the power of belligerents to reduce that protection to a nullity.[1] Clearly, the matter is one which urgently requires international regulation and will doubtless be the subject of discussion at any future conference at which a revision of the laws of war is put down for consideration. If such a right is to be retained, manifestly its exercise should be subject to the ultimate control of an international Prize Court, for the reason that as the jurisprudence now stands, national Prize Courts consider themselves bound by the recitals of justification set forth in the orders and decrees of their governments proclaiming the institution of retaliatory measures.[2] The effect therefore is to make the belligerent the final judge of the necessity and legality of such measures.

IV

Particular Applications of the Reprisals Orders

Sec. 258. Non-Applicability to Turkey. Strict Construction of the Orders. By its express terms the British Order in

[1] Compare the views of Sir Erle Richards in his article cited p. 30 and of Professor C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. II, p. 665, note 3, who remarks that it was natural that "the retaliatory plea should have found favor with the belligerent Prize Court" and that "possibly a like result might be anticipated in the United States under similar circumstances." But he expresses "grave doubt whether the law of nations, as tested by the practice of maritime States up to 1917, gave to a belligerent in virtue of its belligerency a right to establish a new and hostile presumption against neutral vessels and their cargoes not following such a course as that prescribed by the British order." And he adds: "Nor is it to be admitted that general grounds of so-called retaliation afforded the basis of a valid excuse. The real difficulty is seen in the unreasonableness of the assertion by a belligerent of a right to determine for itself how far the equities of neutrals in matters of trade are to be justly subordinated to its own needs in opposition to commerce with its enemy. In that determination the belligerent must be actuated chiefly by its own interests rather than by a regard for the demands of justice. Moreover, its freedom to invoke at will the retaliatory plea tends to encourage the belligerent to endeavor to modify the law according to its own requirements as they develop in the course of the conflict."

[2] Compare the suggestions of Sir Erle Richards in the article cited, p. 33.

Council of March 11, 1915, was directed against trade with Germany and not against that of her allies. Nevertheless, in the case of the *Constantinos* [1] the Crown asked for the condemnation of a Greek vessel and its cargo consisting of foodstuffs consigned to merchants at a fortified place in Turkey, on the ground, *inter alia*, that the shipment came within the purview of Article 3 of the Order in Council. Judge Cator of the Prize Court for Egypt before which the proceedings were instituted held that the Order in Council did not apply to Egypt. Discussing the applicability of the Order in Council, he said:

"The preamble recites that the German government has been guilty of violation of the usages of war, that such conduct has given the Crown a right to retaliate, and therefore that His Majesty has determined to prevent commodities of any kind from reaching or leaving Germany. With this object, the first two Articles of the Order declare that no merchant vessel will be permitted to ship goods to or from any German port. Then come two articles relating respectively to ships sailing to or from a port other than a German port carrying goods with an enemy destination, or belonging to the enemy. The Article which the Procurator asks me to apply in this case is Article 3, which runs as follows: 'Every merchant vessel which sailed from her port of departure after March 1, 1915, on her way to a port other than a German port, carrying goods with an enemy destination or which are enemy property, may be required to discharge such goods in a British or Allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto.

" 'Provided that this Article shall not apply in any case falling within Article II. or IV. of this Order.'

"No doubt this Article, if torn from its context, might be held to apply to a ship going to Turkey, but reading it with its context and with the preamble to the Order, I think the proposition is scarcely arguable. By international agreement enemy goods carried on neutral vessels if not contraband are immune from capture. Germany having been guilty of gross violation of the law of nations has subjected herself to liability for reprisal, and the Crown has decided that by way of retaliation the United Kingdom will do all in its power to prevent goods of any kind from reaching Germany. There is not a word in the preamble or in the Order itself to suggest that these reprisals are to affect any country except Germany, and it is quite clear to me that the word 'enemy' in lieu of the word 'German' is due solely to a desire for euphony on the part of the draughtsman. Moreover, reprisals, although perfectly legitimate as a form of punishment for breaches of international law, must always be treated as exceptional methods of warfare, and Orders for their enforcement must be construed somewhat strictly. It may be open to question whether an

[1] II Br. & Col. Pr. Cas. 140.

enemy against whom no charge is brought can be made to suffer for the inhumanity of its ally, but, however that may be, it is quite clear that this Order does not profess to be made against Turkey, and as it is not suggested that these have any further destination than Turkey, I hold that they cannot be detained or dealt with under the Order in Council."[1]

Sec. 259. Owners of Neutral Ships Detained Under Order in Council Not Entitled to Damages. In the case of the *Stigstad*[2] the owner of a neutral vessel which had been detained under the Order in Council of March 11, 1915, and subsequently released, claimed a sum for freight and for "damages" for the "unwarranted" detention of the vessel. Sir Samuel Evans expressed his willingness to allow a reasonable sum for freight in accordance with the decision in the case of the *Juno*[3] but stated that, in his opinion, he had no right as a matter of law, to order compensation to neutrals for any loss which they may have sustained from the execution of the Order in Council in "a reasonable and proper way." He ventured, however, without deciding the question, to say that if there were "unreasonable delay or any unnecessary expenses" he would have the right "in accordance with the principle applied in days past against captors, to say that for such delay or expense compensation should be made."[4] His judgment was affirmed by the Judicial Committee, mainly on the ground that the Order in Council did not expressly authorize the payment of compensation in such cases. In the course of his opinion Lord Sumner said:

"It is impossible to find in the express words of the Order any language which directs that such damages should be allowed, nor are the principles applicable, which have been followed in the *Anna Catharina* and elsewhere,

[1] Compare also the remarks of Sir Samuel Evans in the case of the *Chumpon and other vessels* (VI Lloyd 420; II Br. & Col. Pr. Cas. 542) concerning the doubts which had arisen as to whether the term "enemy" in Articles 3 and 4 of the Order in Council of March 11 included enemy countries other than Germany. But it was not necessary for him to decide that question since the goods in this case (of Austrian origin) came under the Order in Council of January 10, 1917, which did apply to Austria.

[2] *Supra*, Sec. 253.

[3] I Lloyd 177; I Br. & Col. Pr. Cas. 151.

[4] See also the case of the *Gorontalo* and *Sommelsdijk* (VIII Lloyd 333), where Sir Samuel allowed a sum payable out of the proceeds of the cargo to cover expenses of detention because of special circumstances. In this case the ship had not discharged the cargo and had been allowed to proceed by agreement with the Crown, and had taken the goods to Holland, on an undertaking to bring them back to England.

But in the somewhat similar case of the *Rio De Janeiro* (VIII Lloyd 324), Lord Sterndale disallowed a claim for losses due to the detention of a neutral vessel under the Order in Council of March 11. The principal difference between the two cases was that in the *Gorontalo* case the goods against which the expenses were claimed constituted the whole cargo which had occasioned the detention; in the *Rio de Janeiro* case it was otherwise.

as to allowance of freight and expenses to neutral ships, whatever be the exact scope and application of those cases. Again, with the fullest recognition of the rights of neutral ships, it is impossible to say that owners of such ships can claim damages from a belligerent for putting into force such an Order in Council as that of March 11, 1915, if the Order be valid. The neutral exercising his trading rights on the high seas, rights given him by Order in Council, or equivalent procedure, are each in the enjoyment and exercise of equal rights, and, without an express provision in the Order to that effect, the belligerent does not exercise his rights subject to any overriding right in the neutral."

Sec. 260. No Damages for Detentions Resulting from Erroneous Interpretation of Reprisals Order. In the case of the *Sigurd* (*Part Cargo*) [1] a claim was made for costs and damages on account of the wrongful detention of a neutral vessel and its cargo, which the Prize Court had released on the ground that the Reprisals Order was not applicable in the case, Sir Samuel said the question which he was called upon to decide was whether or not the seizure, in the circumstances in which it was made, was one which imposed an obligation upon the Crown to indemnify the owners in costs and damages. It was, he added, a very important and at the same time a difficult question to decide. Having said this much, he would follow Lord Stowell's decision in the case of the *Luna* (1810) where a capture had been made under similar circumstances, by reason of a wrong construction placed upon an Order in Council. Lord Stowell in this case decided that where there was a legal difficulty of that kind, he would not condemn the captors to pay any costs or damages. Quoting from a decision of the case of the *Ostee* (1855) [2] Sir Samuel concluded:

"That passage shows that the case of the *Luna* was not disapproved of in the Privy Council, and tends to show that the case was one of which they would have approved if they had found it necessary in the facts of that case, to have given their approval. I accept the case of the *Luna* as an authority which I will, and ought, I think, to follow. The result is that the claim for costs and damages is disallowed."

Sec. 261. Owners of Goods Destroyed by Fire While Under Detention Not Entitled to Damages. In the case of the *New Sweden* [3] a claim for damages was made by the owners of certain goods in the parcels mail which had been seized under the Reprisals Order of March 11, 1915, and which while being

[1] VI Lloyd 396; III Br. & Col. Pr. Cas. 87.
[2] 9 Moo. P. C. at pp. 174-175; 2 E. P. C. at p. 449.
[3] X Lloyd 317; III Br. & Col. Pr. Cas. 984.

sent by the customs officials from Kirkwall to London for examination were in the custody of the "captor," the claim for damages being based on the general principles of prize law and on the provisions of the Reprisals Order. Sir Henry Duke, before whom the case was heard, affirmed that so far as the claim was founded upon prize law it must rest upon proof of misconduct or negligence on the part of the captor, the captor of goods, he said, is not an insurer and is under no obligation to insure them against loss.[1] His obligation is merely to "take a fair and reasonable care of the goods; if he fails in that respect, under general prize law he must answer a claim for damages. The goods in this case had been lawfully captured; they had been declared to be goods of enemy origin and ownership within the meaning of the Order in Council; they were enclosed in the mails of a neutral State and had to be opened and examined in order to separate them from innocent goods; and there being no facilities for such examination on the ship or in the port office at Kirkwall, it was necessary to send them to London for this purpose. From first to last there was no misconduct or want of reasonable care on the part of the captor; consequently the claim for damages so far as it was based on prize law must fail. The argument of the claimants, based on the Order in Council, was that there had been a failure of duty in not delivering the packages to the marshal of the court who usually carried insurance on goods detained under the Order in Council and in his custody. Sir Henry Duke held on this point that the Order in Council did not require goods seized under its provisions to be placed in the custody of the marshal and consequently there was no neglect of duty. On both grounds, therefore, the claim was disallowed. The judgment was affirmed by the Judicial Committee.[2] Regarding the responsibility of captors Lord Sumner said:

"There has been from time to time some difference of opinion as to the exact degree of care which is required of captors, but their obligation has always been recognized as being one of care and prudence. It has never been placed so high as that of insuring or answering in all events for the safety of the prize, whether by protecting it from all hazard or by

[1] The Privy Council had already held that there was no obligation on the part of the Crown or the marshal of the Prize Court, to effect insurances against fire for the benefit of cargo owners, whether the cargo was landed or kept on board a captured ship. (The *Sudmark* No. 2, VI Lloyd 369; the *Cairnsmore*, IX, *ibid.*, 376). As a matter of practice, however, the marshal usually insured such cargoes. See further as to this case, Sec. 495, *infra*.

[2] *Ibid.*, 328; *ibid.*, 1000.

providing through policies of insurance a fund to make good its loss. The law is now well settled that it is for unreasonable action, for negligence and for wilful wrongdoing that captors are liable from the time of seizure to the time when the *res* is placed in the custody of the Prize Court. If the obligation went beyond that of reasonable care and abstention from wilful wrong, most of the discussions and decisions on this subject would have been wholly beside the mark. There is neither principle nor authority for placing the responsibility of those who exercise a lawful right of search, or who act in accordance with the terms of a Reprisals Order, any higher than that of actual captors. On the other hand, insurance of the owners' interest is clearly a matter for the owners themselves."

Sec. 262. Owner Liable for Expenses on Account of Detention of Goods Released. In the case of the *Cathay* [1] goods of German origin had been sold to neutral buyers, and had been dispatched to and had arrived at a neutral port before March 1, 1915. On March 25 they were shipped on a neutral vessel for delivery at another neutral port and the vessel having put into a British port, the goods were ordered to be discharged, whereupon the Crown asked for their condemnation under Article 4 of the Order in Council of March 11. Sir Samuel Evans, however, ordered the goods to be released, on the ground that it was never the intention of Article 4 that goods thus dealt with before and after March 1 (the date from which merchant vessels sailing from a non-German port and having on board goods of enemy origin, might be required to discharge them at a British port), and before they were required to be discharged, should be detained for any length of time. Nevertheless, Sir Samuel held that as the goods were properly required to be discharged the Crown was entitled to expenses on account of the detention, to be paid of course by the owners.

Sec. 263. Interpretation of Article 3 of Order in Council. No Distinction in Treatment of Goods Going to or Coming from Germany. In the case of the *Progress* [2] which involved the liability to detention and sale of goods shipped at a neutral port on a neutral vessel and consigned to a neutral port, the Attorney-General contended that the words "or which are enemy property" as used in Article 3 of the Reprisals Order where it is declared that an enemy merchant vessel sailing from her port of departure after March 1, 1915, on her way to a non-German port carrying goods with an enemy destination, "or which are enemy property," may be required to discharge such goods in

[1] VI Lloyd 27; II Br. & Col. Pr. Cas. 303.
[2] V, *ibid.*, 424; II, *ibid.*, 309.

a British port and they shall, if not contraband, be restored by the Prize Court, must have crept into the Article by mistake, since it could not have been intended that enemy goods should be restored. It was argued for the claimants that a distinction should be drawn between goods going to and coming from Germany; that in either case they could be required to be discharged; that those coming from Germany could be detained or sold, but that those destined for Germany whosoever coming from and to whomsoever they belonged must be restored immediately to the claimants. Sir Samuel Evans, however, thought the distinction contended for was not well founded. The goods were therefore ordered to be detained or sold under the direction of the Court, the proceeds to be disposed of at the end of the war.

Sec. 264. Rule Regarding Transfers of Property *in Transitu* and Continuous Voyage Applied to Goods Detained Under Orders in Council. In the case of the *United States*,[1] the Crown asked for the detention or sale of certain goods seized on a neutral vessel on a voyage from Copenhagen to the United States on the ground: (a) that they were of enemy origin having been dispatched to Copenhagen from Germany; and (b) that they were enemy property in the sense of Article 4 of the Reprisals Order. The claimants did not deny that they were of enemy origin but contended that they were neutral goods, for the reason that before seizure the property had passed from the German vendors to the neutral purchasers in America. The question before the Court was whether they were "enemy property" in the sense of the Reprisals Order, i.e. whether they had lost their enemy character and acquired a neutral character before the date of seizure. Sir Samuel Evans held that for the purposes of the Reprisals Order the goods must be regarded as "enemy property" as well as goods "of enemy origin." Regarding the subject of transfers of property in time of war he affirmed that the rule of nullity was not limited to transfers *in transitu*, i.e. transfers made at sea, but applied equally to the purchase by neutrals of goods shipped from the enemy country. As to this, he said:

[1] VI, *ibid.*, 170; II, *ibid.*, 390. Compare also the French case of the *Almazora* (27 *Rev. Gén.*, 1920, *Jurispr.*, 72), where non-contraband goods shipped on a neutral vessel and consigned to the Swiss *Société de Surveillance économique* were detained under the decree of Mar. 13, 1915, the application of which, the Council held, was not prevented by the rule of the Declaration of Paris that the neutral flag covers enemy goods, contraband excepted. The validity of the detention under the decree was upheld but the Council refused to condemn the goods on the ground that they were protected by the Declaration of Paris.

"Having regard to the doctrine of continuous voyage, it makes no material difference that at the one end or the other there is a transit by land; and just as goods from New York to Germany intended to be delivered to the enemy are regarded as 'enemy property,' *qua* the rights of captors. The same principles must be applied whether the goods are being carried from east to west or from west to east. To hold otherwise would be to encourage colourable transactions set up for purpose of misleading and defrauding captors.

"Upon this analogy I hold that 'enemy property' in the Order in Council was intended to mean, and does mean, property which is to be regarded as of 'enemy character' in time of war.

"This view seems to me to be in accordance with the proviso to Article IV. of the Order, which refers to goods which had become neutral property *before* the Order was promulgated. To hold otherwise would make all the provisions of the Order as to 'enemy property' nugatory; because in order to defeat them, all that would be necessary would be that an enemy and his sympathetic neutral should take such steps as would make all goods shipped to and from Germany in theory and on paper the property of the neutral in the strictly legal sense during the whole of the transit.

"For the reasons given I decide that the goods were enemy property as well as of enemy origin; and I order their detention until the conclusion of peace, with liberty to the Crown to apply for an order for their sale and detention of the proceeds."[1]

Sec. 265. Provisions of Reprisals Order Applied to Enemy Government Securities. In the case of the *Frederick VIII*,[2] the question came before the British Prize Court as to whether German government bonds sent by an enemy bank in Berlin to Copenhagen for transmission to a bank in Chicago and which were required to be discharged in a British port from a Danish steamship, were to be considered as "goods" or "commodities" within the meaning of the Order in Council of March 11 and therefore liable to detention as goods of enemy origin and [or] ownership. Sir Samuel Evans held that they were goods of enemy origin and an order was issued for their deten-

[1] See also the case of the *United States No. 2* (II Br. & Col. Pr. Cas. 525), where Sir Samuel Evans further held that the rule against transfers of property *in transitu* applies to all transfers made after the goods have begun their original voyage and not merely after they have been laden on another vessel which takes them ultimately to their final destination. Transit, he said, begins where the goods commence their journey and not at the place where they are first put on board ship. The goods in the present case having been dispatched from a house in Germany to its branch in Copenhagen and by the latter reforwarded to the United States, the goods were held to be not merely of German origin but enemy goods, since the ownership remained in the German shippers.

See also the case of the *Noordam and Other Vessels* (IX Lloyd 205, 232; III Br. & Col. Pr. Cas. 488, 599), where the applicability of the Reprisals Order to transfers in transit is discussed by Lord Sterndale and Lord Sumner.

[2] VI, *ibid.*, 109; II, *ibid.*, 395.

tion until the conclusion of peace when they would then be dealt with as the Court might order. As to the meaning of the words "commodity" and "goods," Sir Samuel said:

> "The word 'commodity' is one of extensive meaning, denoting anything that is useful, convenient, or serviceable. And it would not be easy to conceive a wider or more comprehensive phrase than 'commodities of any kind.' It is a phrase more used in common speech than in legal terminology; so it is not surprising that in the operative part of the Order the legal word 'goods' and 'property' are used simply, without the collocation of any such words as chattels, wares, or merchandise. I think it is abundantly clear that the bonds in question come within these words. If money, notes or cheques were shipped from America to Germany for the purchase of these bonds they would clearly be goods or property with an enemy destination; and equally so are the bonds sent in return, goods or property of enemy origin."[1]

Sec. 266. Goods the Produce of Territory Under Enemy Occupation Are Goods of "Enemy Origin." In the case of the *Leonora and Other Vessels*,[2] the Crown asked for the condemnation of eight Dutch and Swedish ships, together with their cargoes which consisted mainly of Belgian and German coal and coke. The seizures were made under the authority of the Order in Council of February 16, 1917, which provided that a neutral vessel encountered at sea on her way to or from a port in any neutral country affording means of access to enemy country, without calling at a British or allied port, should be deemed, in the absence of proof to the contrary, to be carrying goods with an enemy destination or of enemy origin and that such vessel and goods should be liable to condemnation. The vessels were captured during the course of a voyage from Rotterdam to Sweden. The claimants contended that even if the coal came originally from Belgium it was not of enemy origin, since Belgium was not an enemy country; and alternately, that if it were of enemy origin it was not liable to confiscation under international law because it was neutral property. As to the first contention it was argued that the production of the coal in territory under German occupation did not in itself make the coal of enemy origin, since the mines were operated by their Belgian

[1] To the same effect see the case of the *Noordam and Other Vessels* (IX Lloyd 205, 232; III Br. & Col. Pr. Cas. 488, 599), where it was held by Lord Sterndale and upon appeal by the Judicial Committee that certain bearer bonds sent from Germany to Holland and which were subsequently seized on neutral vessels while in transit to America were "goods" within the meaning of the Reprisals Order and therefore subject to detention. The meaning of the term is fully discussed by Lord Sumner in his opinion for the Judicial Committee.

[2] VII, *ibid.*, 262; III, *ibid.*, 181, 385.

owners and the price of the coal was paid to them, the Germans merely controlling the output and preventing exportation to their enemies.

As already pointed out,[1] Sir Samuel Evans in this case upheld the validity of the Order in Council and condemned the ships and cargoes and his judgment was affirmed by the Judicial Committee. Lord Sumner speaking for the Judicial Committee said their Lordships were satisfied that the cargo was of "enemy origin" in the sense in which the words were used in the three Orders in Council. Regarding the source and mode of production of the coal, Lord Sumner said:

"The collieries, from which this coal came, were included in the German 'Kohlenzentrale,' a system by which the coal production of Belgium was strictly controlled and was compulsorily manipulated, with the object of supporting German exchange and assisting German commercial transactions with neutral countries, especially Holland and Sweden. In particular, the export of Belgian coal to Sweden was encouraged, because it assisted to procure a reciprocal importation of ore from Sweden. The actual sale of this very cargo was arranged in Cologne by an official of the 'Kohlenzentrale' in his own name, nor is it proved that he was in fact selling on behalf of some undisclosed principal, either in Belgium or elsewhere. Payment for it was made by lodging Swedish kroner in a Stockholm bank to the credit of the 'Kohlenzentrale.' It is stated in the German regulations that the 'amount realized by the sale will be paid to the vendors,' whoever they may have been. Perhaps this may have been so, for, if no money at all reached the colliery, presumably the getting of coal there would come to an end, but whatever crumbs may have been allowed to fall from the masters' table, the fact is clear that these coals were won, sold and shipped as part of a German government trade, carried on for the benefit of the enemy in prosecuting the war. To deny them the term 'of enemy origin,' as used in this Order, would be pedantic. The Order is devised to give effect to a scheme of retaliation, which will compel the enemy to desist from outrageous conduct by crippling or preventing trade in goods, which, in a broad but very real sense, he made his own. It does not employ this expression 'of enemy origin' as a mere geographical term, nor as merely descriptive of the nationality of the original owners of the coal, who were involuntarily and probably reluctant victims of the German system. Upon this point the view of their Lordships is that the learned President's conclusion was right."

Sec. 267. Reprisals Orders Not Applicable to Contraband Goods. The Order in Council of March 11, 1915 (Art. 3), provided that any merchant vessel which sailed after March 1, 1915, for a non-neutral port, carrying goods with an enemy destination might be required to discharge them at a British

[1] See Sec. 252, *supra*.

port; that the goods should be placed in the custody of the Prize Court; and that, *unless contraband of war,* they should, if not requisitioned, be restored by order of the Court upon such terms as it might deem to be just. In the case of the *Kronprinzessin Victoria,*[1] Sir Samuel Evans said that the words "unless they are contraband of war" naturally meant that "the Order in question does not apply to such goods for which there are other legal provisions." The French Prize Council in the case of the *Barcelo No. 2,*[2] placed a like interpretation on a similar provision in the French reprisals decree of March 13, 1915.

Sec. 268. The Reprisals Order Did Not Prevent Neutral from Purchasing Goods from Enemy After Seizure by Belligerent. In the case of the *Oscar II* (No. 2),[3] goods had been seized while in transit from New York to *Malmö.* The Crown claimed condemnation of the goods as prize, or, alternatively, detention under the Order in Council of March 11. In March, 1917, while the case was still pending, the claimant, taking his chances, purchased whatever property there was in the vendors. Lord Sterndale held, and his judgment was affirmed by the Judicial Committee, that the Order in Council did not divest enemy property or subject it to confiscation but merely provided for its detention with power in the Prize Court to deal with it in such manner as it deemed just. Until such disposition, the ownership in the goods remained, and consequently the owner might sell whatever interest he had in it and neutrals were free to buy it. Lord Parmoor, speaking for the Judicial Committee, said:

> "In international law there is no rule which forbids the purchase of goods by a neutral from an enemy after seizure by a belligerent. Such a purchase is no doubt subject to all rights which accrue to a belligerent as a consequence of the seizure. For instance, if the goods purchased by a neutral are condemned as prize in a Prize Court, this is a risk which a neutral must have known would attach to his purchase at the time when he made it, and defeats any right which he otherwise might have to claim the goods. On the other hand, if, apart from the operation of some special order such as the Reprisals Order of March 11, 1915, the purchased goods are liberated by the Prize Court, the ownership of the neutral purchaser becomes effective, if, as is admitted in the present case, the transaction has been carried through by a *bona fide* transfer which in itself is not open to question, and is not questioned by the appellant."

[1] VII, *ibid.*, 230; III, *ibid.*, 247.
[2] *Decisions du Conseil des Prises* (1916), 272.
[3] II Br. & Col. Pr. Cas. 542.

He added that there was "not a word in the Order which can be construed as depriving an enemy owner of the right, which he otherwise would possess, to transfer the goods seized, or their proceeds, to a neutral purchaser, or as invalidating the title of the neutral purchaser. Whatever interest in the goods Rassmussen [the vendor] possessed at the time of sale as representing the owner of goods detained until the close of the war, passed under the terms of the purchase to the respondent; and the respondent, as a neutral purchaser, is entitled to claim payment of the proceeds of the sale of the goods after the close of the war."

Sec. 269. Conditions of Final Release of Goods Detained Under Reprisals Order. Expenses and Insurance. In cases where the seizure of goods under the reprisals Order of March 11, 1915, was upheld as valid the usual decree of the Prize Court was an order directing that they, or the proceeds in case they were sold, should be detained until the conclusion of peace, or until further order. A large number of orders of this kind were issued during the war. The Order in Council directed that the proceeds should in such case be restored by the Court upon such terms as it might, in the circumstances, deem to be just to the person entitled thereto. Upon the conclusion of peace the owners came before the Prize Court and asked for the release of their goods, or the proceeds, where they had been sold. In July, 1920, three typical cases were selected and heard in the case of the *United States No. 3* [1] in order that the Prize Court might lay down the general principles under which all such claims should be disposed of. At the hearing, evidence was produced that under the law applicable to mercantile transactions in time of peace—though not according to the rules of international law which apply to the passing of property shipped in time of war—the goods claimed were at the time of seizure the property of the claimants. The Attorney-General thereupon waived the rights of the Crown in respect of the declarations of enemy ownership theretofore made by the Court and consented to an order of release, whenever the Court was satisfied that the claimants were, according to municipal or mercantile law, the owners at the time of seizure. He contended, however, that orders of release should be conditioned upon payment by the claimants of the necessary expenses of detention and he also argued that these expenses ought to include premiums paid for

[1] X Lloyd 156; III Br. & Col. Pr. Cas. 750.

the insurance of the goods. The contention of the claimants was thus stated:

"The argument for the claimants as to the costs of bringing in, unloading, warehousing, and delivery was that these seizures were self-regarded acts of a belligerent Power, not provoked by any previous action of the claimants, or warranted by any infraction of the ordinary rights of belligerents. The expense of such proceedings, it was said, ought not to fall upon neutrals, but ought rather to be borne by the belligerents. As to insurance premiums, counsel for the claimants relied upon the usual practice in prize, under which, in ordinary circumstances, expenses which have been incurred for insurance of goods afterwards ordered to be released are not charged upon the goods."

After adverting to the power of the Court in the matter of expenses on account of detention, Sir Henry Duke said:

"Although the goods here in question were not claimed for condemnation, they are in some particulars similarly circumstanced to goods so claimed. They were rightfully seized, unladen and detained, and, if sold, were rightfully sold. Their seizure and detention, where it took place in course of any voyage which began after the publication of the Reprisals Order was seizure and detention consequent upon shipment presumably made with knowledge of the Order and of the measures directed by the Crown to be taken thereunder. Discharge in a British port of goods within the prohibitions in the Order, custody of the marshal, and sale by order of the Court, if necessity arose, were things which notoriously involve expense—expenses of unlading and warehousing in all cases and expenses of sale in some. On behalf of the Crown it was contended also that, in the circumstances of the war, insurance was an expense which no prudent custodian of the merchandise of others would feel at liberty to omit. The question between the Crown and the claimants is whether these expenses ought to be borne by the goods and proceeds now to be released.

"Whether the matter is considered generally under the Order in Council, or in the light of the practice of the court in prize, the terms upon which it is just that the goods should be released are, in my view, terms of payment by the claimants of the expenses properly and necessarily incurred in the handling of their respective parcels."

As to the claim of the Crown that the expenses should include insurance, Sir Henry observed that under ordinary circumstances goods in the custody of the marshal of the Prize Court under a claim of condemnation do not, on their release, have to bear the expense of insurance where the expense has not been incurred by order of the Court or at the request of the claimant. But in these cases the goods were not under a claim for condemnation. They were held by the marshal for the owner "who by his own act has subjected his property to de-

tention." The captor had no interest in them; the marshal was charged with their custody for the sole purpose of eventual restitution; he had incurred expenses of insurance and instances were referred to in which but for such insurance claimants whose goods had been destroyed would have lost their value. Insurance was a wise precaution taken in the interests of the claimants themselves; it was therefore just that they should bear the cost, and it was accordingly so ordered.[1]

Sec. 270. The Same. Captor Not Generally Entitled to Costs. Where goods were detained under the Reprisals Order, on the ground that they had an enemy destination, was the Crown entitled to costs upon the eventual release of the goods? This question came before the Prize Court in May, 1920, in the case of the *Frederick VIII (part cargo)*.[2] Sir Henry Duke refused to allow the claim of the Crown. He pointed out that there was no analogy between the practice under the Reprisals Orders during the Napoleonic wars and those of the World War. The former provided for the *confiscation* of goods, the latter did not. The order of March 11, 1915, on the contrary, was "a protective measure of a more generous kind toward neutrals than had been adopted in more ancient practice. No analogy is to be found," he said, "in the course taken as to costs under the old Reprisals Orders. Costs there were costs in prize, and unless there were special circumstances affecting the conduct of the claimant he lost his goods but was not subject by way of penalty to payment of the costs of the Crown in the suit in which the confiscation of the goods was determined upon." During the present war orders against the claimants for payment of costs had sometimes been made and sometimes not, depending upon the circumstances. Regarding the present claim, his Lordship concluded:

"The Crown claimed confiscation of the goods and failed. The claimants sought unconditional release of the goods and failed. The middle course was taken, and the goods were ordered to be detained. No particular circumstances of turpitude on the part of this claimant in the discussion of this claim have been brought to my notice, which ought to induce me to visit him with costs as a penalty for impositions sought to

[1] Lord Sumner for the Judicial Committee in the case of the *New Sweden* (X Lloyd 331), discussing this question, said: "As against claimants, to whom goods which might have been *condemned* are in fact released, the premiums are not charged on them in ordinary circumstances. Where, however, the goods are *detained* only and cannot be condemned, it has been held (the *United States*) that the premiums constitute an expense which the goods must bear."

[2] X Lloyd 141.

be practised upon the Court. He made his case and was successful, and his goods have been detained. I think that the result of the partial success and the partial failure on each side in this litigation is that there should be no order as to the costs of it."

But in the case of the *San Francisco*,[1] Sir Henry Duke held that while, *prima facie*, a claimant for the release, upon the conclusion of the war, of goods detained under the Reprisals Order of March 11, 1915, ought not to be required to pay any costs, nevertheless, where at the hearing he had put forward a false claim as to the destination of the goods he ought to be required to pay the costs of the motion which had been made necessary by claimant's conduct, although he should not be condemned to pay the costs of the trial.

V

Neutral Goods Under Enemy Flag. Interpretation of Article 3 of the Declaration of Paris

Sec. 271. Preliminary Observations. In the preceding sections the views of the Prize Courts have been given regarding the meaning and application of Article 2 of the Declaration of Paris which exempts from capture enemy goods, with the exception of contraband, under a neutral flag. Article 3 of the Declaration lays down the converse rule that neutral goods, contraband excepted, are when carried under an enemy flag exempt from capture. As has been pointed out, the protection intended to be established by Article 2 was subjected to serious infringement through the reprisals orders and decrees put into effect by Great Britain and France. Happily, however, the belligerent governments showed much greater respect for Article 3 although it too was strictly interpreted by the Prize Courts and in some cases the protection which it seemed to offer to neutral property on enemy ships was denied, through the interpretations which were placed upon it.

Sec. 271a. Article 3 Protects Only Cargoes. View of British Prize Court. In the case of the *Schlesien*,[2] the question was presented to the Prize Court at London as to whether a receiving apparatus for recording sounds transmitted by water, which had been leased to an enemy steamship company and in-

[1] X Lloyd 145.

[2] II Lloyd 92; I Br. & Col. Pr. Cas. 13.

stalled on one of its vessels by a neutral firm, was exempt from confiscation under Article 3 of the Declaration of Paris. The claimant argued that the protection of all neutral-owned property on an enemy ship, whether in the nature of cargo or not, clearly came within the spirit, if not the letter, of Article 3. Sir Samuel Evans, however, condemned the apparatus on the ground that Article 3 by its express terms protected only *cargoes (les marchandises)* and not articles affixed to and being a part of the ship. Such apparatus as this, he said, was not "goods" or "merchandise" and it was never the intention of the Declaration to protect it. In the course of his opinion, he said:

"The intention of the Declaration was to make things during war as easy and as little disturbing as possible to those who were engaged in neutral commerce. Now, it is perfectly obvious that in a ship of modern construction many kinds of apparatus similar to this one may be installed in the ship and form part of the vessel itself. Far be it from me to say that, if these things can be easily detached, the captors ought not—if in their discretion they think fit to do so—to hand over these goods to the persons who appear to be the owners. Goods belonging to the captain and crew of vessels, such as private chronometers, compasses and sextants have been given up; and I have given directions to the marshal since the war to hand such goods on board such vessels to the captain and the crew. But it is a wholly different thing to say that the claimants of goods of this description have the right to come to this Court and say: 'This particular piece affixed to the ship belongs to me, and I therefore desire and request you to adjudicate upon it and upon all sorts of legal questions which may relate to it, either by the law of Germany, or by the law of America, or by the law of any other country.'"

'The Prize Court does not exist for that purpose. The Court decides whether, having regard to the ship as it stands, apart from the cargo, it is a subject-matter fit for condemnation as prize. I have already condemned the ship as prize, and I am not called upon in this Court to investigate such matters as the property in parts of the ship, whether they have been leased, or whether the property in them remains in the original lessors. These are matters which I have not got to determine. I do not say that because I am not conscious of the importance of doing what is right and fair to any neutral in respect of any property which is clearly shown to be his; but in a case of this description it must be dealt with by the Executive, and those who advise the Crown. So far as this Court is concerned, the apparatus is to be regarded as part of the ship, which I condemn."[1]

[1] The question whether Article 3 protected an enemy lighter which at the time of capture was being towed by neutral tug boats came before the German Prize Court in the somewhat curious case of the *Zuiderzee* and *Gouwzee* (I *Entsch.* 305; Fauchille et de Visscher, *Jurispr. All.* 230). Were the lighters to be treated as "cargoes" which were protected by the neutral flag of the tug boats which were towing them or were they "ships" and therefore not protected by the Declaration of Paris? The Prize Court held that they were "cargoes" and would have been protected by the neutral flag but

Sec. 272. The Same. View of the German Prize Court. A somewhat similar question came before the German Prize Court in the case of the *Indrani*,[1] which involved the liability of Germany to make compensation for bunker coal belonging to neutrals and found on an enemy ship (English) captured by a German war vessel. After employing the vessel as a naval auxiliary for several months during which period a portion of the coal was consumed by the Germans in operating it, they sank the vessel, together with a quantity of other coal which was neutral-owned and was being carried as cargo. It was argued that the coal in the steamer's bunkers and which the Germans used in operating the vessel after the seizure was a "dependency" (*bestandteile*) of the ship and not cargo and as it was on an enemy vessel, it must be regarded as enemy property and must therefore follow the fate of the vessel as in the case of the signalling apparatus on the *Schlesien*. The Court held, however, that the "dependencies" of a ship are not "constituent elements" of the ship itself and may properly belong to third parties; that bunker coal on a ship is not necessarily to be considered as a "dependency" of the ship and therefore sharing its fate; that its enemy or neutral character must be determined by the nationality of the owner; that the commander of the German vessel making the capture had a right to use the vessel captured as he found it with all its equipment and supplies including the coal in its bunkers, even though it was the property of neutrals; but that payment for the coal must be made to the owners.[2] It will be observed that the difference between this case and that of the *Schlesien* was that the neutral-owned signalling apparatus which Sir Samuel Evans condemned in the latter case was affixed to the ship, whereas in the present case the neutral property for which the German Prize Court allowed compensation consisted of coal in the ship's bunkers. It is not clear that this difference was sufficient to justify condemnation in the former case and indemnification in the latter.

Sec. 273. Declaration of Paris Does Not Protect Interests of Neutral Mortgagees in Enemy Ship or Cargo. In

for the fact that they were regarded as contraband. Accordingly they were condemned and so were the tug boats, the latter because they were "transporting" contraband.

[1] I *Entsch.* 95; Fauchille et de Visscher, *Jurispr. All.* 74.

[2] No indemnity, however, was allowed for the coal sunk with the vessel, this on the principle that the destruction of neutral goods on an enemy ship gives no right to an indemnity, in case the destruction of the ship is a legal act of war.

the case of the *Marie Glaeser*,[1] it was argued on behalf of certain neutral and British mortgagees who had made advances of money on a German vessel before the outbreak of war that the international law of prize ought to be extended and applied so as to protect the rights of such mortgagees in accordance with what was contended to be the policy and principle upon which the Declaration of Paris was founded. After reviewing the history and status of the Declaration, which, he said, he would regard as "a recognized and acknowledged part of the law of nations," Sir Samuel Evans held that it did not cover the interests of neutral or British mortgagees in enemy ships, its purpose being to protect only goods or merchandise carried in vessels and not the vessels themselves. On this point, he said:

"The Declaration of Paris, in the two parts referred to, only dealt with goods or merchandise carried in vessels, and not with the vessels themselves. If it had been intended to deal with vessels, and property rights, or interests in them, that would have been expressed. The object was to ensure the maintenance of maritime commerce by making certain goods carried over the seas immune from confiscation. . . .

"Apart, therefore, from any assistance which may be derived from decisions of Prize Courts since the date of the Declaration, this Court could not accede to the suggestion that neutral mortgagees of vessels should have a rule of law created for their protection."[2]

Sec. 274. Owner of Neutral Goods Destroyed on Enemy Ship. No Right to Compensation. German and Austrian Interpretation of Article 3. In the case of the *Glitra*,[3] the German Supreme Prize Court held that Article 3 of the Declaration of Paris did not protect neutral goods on an enemy ship against destruction or give the owner a right to compensation therefor, if the destruction of the ship was legally justified by the circumstances.

In the course of its opinion, the Court said:

"The seizure and capture of an enemy ship is, as regards third States, a legal act of war, authorized by international law. Such acts do not give birth indiscriminately to claims for damages on the part of the subjects of enemy or neutral States. Undoubtedly Article 2 of the Declaration of Paris forbids the seizure of goods belonging to neutrals (with the exception of contraband of war) even when they are found on board an enemy ship. These goods moreover are not liable to confiscation when the prize

[1] I Lloyd 56; I Br. & Col. Pr. Cas. 39.
[2] See further, as to this case, Sec. 38, *supra*.
[3] I *Entsch.* 35; Fauchille et De Visscher, *Jurispr. All.* 25; English trans. in 10 *Amer. Jour. of Int. Law*, 921. Further discussion of this case Secs. 237, *supra*, and 473, *infra*.

is brought into port. But there can be no question of recognizing to persons interested in the cargo the right to be indemnified for the injury suffered on account of the capture of the ship, the interruption of the voyage or the diversion of the ship to a port other than that of its destination. There is no more right to damages when the goods themselves suffer injury in consequence of the seizure of the ship; when, for example, they are destroyed as the result of an accident at sea while the prize is being taken in.

"Since seizure is a legal act, there is no legal basis whatever upon which to found an injury to the goods, which the neutrals have, moreover, themselves caused by entrusting their property to an endangered ship. Therefore, since seizure is a legal act of war, there is no legal basis of establishing the injury to the goods, when they are lost through an act of war directed against the ship when owing to the circumstances such an act must necessarily also be directed against the cargo.

"In regard particularly to the conditions of naval war, however, Article 3 of the Declaration of Paris gives protection neither in general nor specifically to neutral property against the actions of the belligerents due to the necessities of war. The purpose of Article 3 of the Declaration of Paris was to extend protection to neutral property in an enemy ship which, under the prize law as it existed prior to the Declaration, was subject to capture. What the necessities of war demand must be allowed to take place, whether neutral property is on board the ship or not. If, according to Article 2 of the Declaration of Paris, the neutral flag protects enemy property, this does not mean, that, *vice versa,* neutral property protects the enemy ship, and protects it, indeed, not only against destruction but also in many cases against every exercise of prize law.

"As far as can be seen up to the most recent time, no one has ever disputed this holding. Compare, *Entsch. des franz. Conseil d'Etat* of May 21, 1872, in Dalloz, *Jurisprudence générale,* 1871, III, No. 94, in the prize case of the *Ludwig and Vorwaerts;* Dupuis, *Le droit de la guerre maritime,* 1899, p. 334; de Boeck, *De la propriété ennemie privée sous pavillon ennemie,* Sec. 146; Bordwell, *Law of War,* p. 226; Wheaton, *International Law,* 4th ed., p. 507, Sec. 359e; Oppenheim, *International Law,* II, pp. 201 ff.; Calvo, *Droit International,* V, 3033, 3034; Hall, *International Law,* 5th ed., pp. 717 ff.[1]

The decision in this case was followed by the German Prize Court in the case of the *Indian Prince,*[2] which involved the identical question. Adverting to the judgment in the case of

[1] The statement of the Court that neutral property on an enemy ship was, under the prize law as it existed prior to the adoption of the Declaration of Paris, was subject to capture is hardly in accord with the facts. On the contrary, Article 3 was declaratory of a long established rule of international law dating from the middle ages. Compare Wheaton, *History of the Law of Nations,* p. 63, and Lawrence, *Principles of International Law,* Sec. 242.

[2] I *Entsch.* 87; Fauchille et De Visscher, *Jurispr. All.* 69; Eng. trans., 10 *Amer. Jour. of Int. Law,* 930. In this case the Prize Court also held that the American claimants were not protected by the provisions of the treaties of 1785, 1799, and 1828 between Prussia and the United States, which provisions the Court interpreted to be inapplicable to the facts of the case.

the *Glitra*, and reaffirming the rule there laid down that a neutral owner of goods destroyed on an enemy ship which has been legally sunk has no right to compensation either under the German prize regulations or the general principles of international law, the Court said:

"The question here is, whether the commander is compelled by international law to refrain from sinking an enemy vessel when he has a legal right to do so, because its destruction would mean the loss of the neutral goods on board, especially if it is impossible for him to bring the vessel in. After repeated examination, the Court must continue to answer this question in the negative. In this respect reference can only be made to the former decision. In particular it is incorrect to say that the former decision was based on the fact that, by shipping their goods in an enemy vessel, the shippers took the risk of capture and destruction, and therefore could not claim compensation. On the contrary, in taking a general view of the matter, the expression to the effect that neutrals had a free choice whether they would entrust their goods to the enemy ship and run the risks in connection therewith, is only used in order to show that the denial of compensation is correct not only from a legal point of view but also cannot be considered as unreasonable.

"The principal reason which is decisive of the case in question lies in the actual dependence of the cargo on the fate of the ship, in consequence of which the cargo has to suffer the injury resulting from an act directed against the ship, legally committed according to prize law. It cannot be seen why this principle, which is generally acknowledged and placed beyond doubt by the report of the drafting committee upon Article 64 of the Declaration of London, should apply only to the capture of a ship and not to its just destruction."

It will be seen that the basis of the reasoning of the Prize Court was that the belligerent right to sink an enemy ship in certain circumstances overrides the immunity of neutral property which may happen to be aboard; that complete respect for the immunity of the goods would deprive the captor of the exercise of the belligerent right of destroying the ship; that a cargo must be regarded as a "dependency" of the ship; and that if the latter is liable to destruction the former shares the lot of the ship, regardless of its neutral character. The validity of this interpretation of both the general rule of international law and of Article 3 of the Declaration of Paris does not seem to be well-founded and it has been the subject of strong criticism.[1] The

[1] See a learned article on the subject, by Professor Quincy Wright, entitled "Destruction of Neutral Property on Enemy Vessels," 11 *Amer. Jour. of Int. Law*, pp. 358 ff. See also the criticism of Verzijl (*Grotius Ann. Int.* 1917, pp. 71-72), who declares that the decision of the German Prize Court was not only contrary to the law of nations but also contrary to the view maintained by the German delegation at the London Naval Conference. It also appears to be contrary to the views of leading German authorities.

Supreme Prize Court of Austria-Hungary in the case of the *Firenze*,[1] came to the same conclusion as did that of Germany in regard to the non-liability of a captor to make compensation for neutral property lost on an enemy ship legally destroyed. Adverting to Article 3 of the Declaration of Paris, the Court declared that the Article dealt with a question of maritime law, whereas the destruction of neutral goods on a ship was not a matter of maritime law, but merely something incidental to the sinking of the ship. "The right to destroy the goods on a ship follows of necessity from the right to destroy the ship, when that is lawful, as it was in this case." Reviewing the discussion of this subject at the London Naval Conference, the Court called attention to the question put by the British delegation, namely, whether the owners of neutral goods on an enemy ship which are not subject to confiscation under the Declaration of London should be reimbursed for their loss in case the ship is lawfully destroyed or is the destruction of the ship an act of war which does not require compensation for neutral property lost in consequence thereof?[2] During the discussion of the question only the Japanese delegation, it was asserted, admitted the duty to make compensation in such case. No further discussion of the subject took place and the question was therefore left open. The French delegation was quoted as having made the following statement: "The destruction of a prize on the high seas which was necessitated by military reasons, is an act of war which does not carry with it the right of indemnification on the part of the neutral owner of goods lost in consequence thereof."[3]

Compare Schramm, *Das Prisenrecht in Seiner Neuesten Gestalt* (1913), p. 511; Wehberg, *See-Kriegsrecht* (1915), p. 295, and others cited by Huberich in the London *Solicitors' Journal and Weekly Reporter*, April 10, 1915, p. 395. As to German liability to make compensation for the destruction of neutral property in such cases see further Sec. 473, *infra*.

[1] *Normal Verordnungsblatt für die K. u. K. Kriegsmarine*, Mar. 13, 1917 (11 Stück, p. 131).

[2] Here the Court cited Schramm, *Das Prisenrecht*, p. 41. Among other cases in which the Prize Court adopted the above mentioned view were the *Langthon Hall* (*ibid.*, Nov. 27, 1917, 40 Stück, p. 505) and the *Yasaka Maru* (*ibid.*, 502).

[3] But the Court failed to point out in this connection that Dr. Kriege of the German delegation expressly combated the French proposal. Compare Verzijl (*Grot. Ann. Int.*, 1917, p. 72), where the references to Kriege's remarks are given.

CHAPTER IX

DETERMINATION OF NATIONAL CHARACTER OF SHIPS

I

Article 57 of the Declaration of London

Sec. 275. Rule of Article 57. The determination of the liability of a ship to capture and confiscation involves the determination of the preliminary question of its national character. The liability of the cargo to capture may also depend upon the national character of the ship, as where its non-enemy character cannot be established, since in that case the cargo is presumed to have an enemy character if the ship which carries it is an enemy ship. There are two rules by which the enemy or non-enemy character of ships may be determined. The first is the nationality of the flag which the ship flies, or rather that which it is legally entitled to fly; the second is the nationality of the owners of the ship. The first rule is that which is enunciated in Article 57 of the Declaration of London which declares that "the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly."[1] It will be observed

[1] Prior to the enunciation of this rule there had been a divergence of opinion and practice between Great Britain and continental Europe regarding the test of enemy character. Great Britain had maintained that while a vessel sailing under an enemy flag was always good prize the nationality or rather the domicile of the owner in the case of ships flying neutral flags was the true test. In other words, the flag was conclusive only when it was an enemy flag; if it was a neutral flag it was not conclusive. In the latter case the Prize Court might go behind the flag and ascertain who was the owner and if it found that he was an enemy or was domiciled in enemy country the ship might be confiscated in spite of the fact that it flew, and had a right to fly, a neutral flag. If the owner, though an enemy subject, was domiciled in neutral territory his ship, unless flying an enemy flag, must be treated as a neutral ship; on the other hand, if he was a neutral subject but domiciled in enemy country his ship was regarded as an enemy ship. Continental opinion and practice, however, regarded nationality rather than domicile as the test. If the owner of the ship was an enemy subject, irrespective of his domicile, his ship was treated as an enemy ship; if he was a neutral subject, no matter where domiciled, his ship was neutral. Compare as to this Bentwich, *The Declaration of London*, p. 109.

that it is not the flag which the ship may be actually flying at the time of capture but the flag which it has a legal right to fly under the municipal law of the country in whose merchant marine it is registered. The rule is also subject to the provisions of the Declaration of London (Arts. 55-56) respecting the transfers of flag to neutral registry. It may happen therefore that a vessel may have a right to fly a neutral flag according to the municipal law of the country to whose registry it has been transferred and yet the transfer may have been illegal under the Declaration of London, in which case the neutral flag is not conclusive as to the national character of the ship. But the Declaration of London not having been ratified by any of the powers when the World War broke out none of the belligerents were bound to treat Article 57 as binding unless the rule which it enunciated was regarded as merely declaratory of an existing customary rule of international law. In fact, the rule had already been incorporated in the naval codes or prize regulations of practically all the maritime belligerent powers which had issued such codes or regulations, Great Britain being the only important one which had not done so.

Sec. 276. Early Attitude of the Belligerent Powers Toward Article 57. Upon the outbreak of the war most of the belligerent powers issued decrees or orders putting the Declaration into effect with certain modifications notwithstanding its non-ratification.[1] None of the modifications, however, touched Article 57, so that the rule which it enunciated was intended to be the rule which would be applied in determining the enemy or neutral character of vessels which should be brought before the Prize Courts, and during the first year of the war it was the rule actually applied for the most part by the Prize Courts.

But by an Order in Council of October 20, 1915, the British government announced that Article 57 would no longer be regarded as being in force and that henceforth the British Prize Courts should apply "the rules and principles formerly observed in such courts." By a decree of October 23 the French government followed the example of the British government and announced that a vessel flying an enemy flag would be considered

[1] See *supra*, Sec. 106. It may be remarked that the French Prize Council applied Article 57 even before the Declaration had been put into effect by the French government. See the case of the *Ferd Laeiz* (Fauchille, *Jurispr. Franc.* 202), where the Council held that a vessel captured on August 22, 1914, before the Declaration had been put into effect, and which was flying an enemy flag was an enemy vessel "conformably to Article 57 of the Declaration of London."

neutral if it was owned by persons of neutral nationality, and, reciprocally, if it was flying a neutral flag it would be treated as an enemy vessel if it was in fact owned by the nationals of an enemy country or by persons residing therein. Russia by a ukase of February 17, 1916, followed the example of her allies, and the Chinese prize regulations of 1917 (Art. 3) introduced the same principle in modified form, by proclaiming that ships flying a neutral flag but whose owners or some of whom were domiciled in an enemy country, should be regarded as enemy ships.[1] Germany, by way of reprisal against Great Britain and her allies, by an ordinance of July 16, 1917, proclaimed that neutral ships owned wholly or in preponderating part by enemy subjects, including corporations and companies having their seat in enemy territory, should be regarded as enemy ships. The Italian government by a decree of June 15, 1915, announced that the Declaration of London with certain modifications, none of which touched Article 57, would be applied during the existing war,[2] but by a decree of June 24,[3] Article 57 was modified in the interest of owners of enemy ships, who were of Italian nationality (racial) and Italian sentiments (for example, owners who were of Austro-Hungarian political nationality but Italian by race and sympathy), when such ships were found in Italian ports at the outbreak of the war. The Italian Prize Commission declined however, to apply the rule in the case of captures, apart from those made of vessels found in port at the outbreak of the war.[4]

The action of Great Britain and her allies in withdrawing Article 57 was legally justified on the assumption that the Article was not declaratory of an existing binding rule of customary law, but an innovation, and hence they were free to apply the rules which they had formerly observed.[5] At first the article

[1] Cheng, *Judgments of the High Prize Court of the Republic of China*, 136.
[2] Text in Fauchille et Basdevant, *Jurispr. Ital.*, Annexe, X.
[3] *Ibid.*, XIII.
[4] See, for example, the cases of the *Gorizia*, *ibid.*, 429, and the *Stamboul*, p. 445.
[5] In the case of the *Hamborn* (VII Lloyd 73), Lord Sumner, speaking for the Judicial Committee of the Privy Council, referred to Article 57 as "varying the rule of international law" and stated that the Crown by adopting the Declaration of London, "had waived its right to rely on other criteria" than the flag, but that by the Order in Council of October 20, 1915, abrogating Article 57, "that waiver was withdrawn."
The French Prize Council also proceeded on the theory that the rule of Article 57 was an innovation upon the old rule and after the French decree withdrawing Article 57, the Council relied upon the ancient rule of French prize law in support of the view that ownership as a test of enemy character prevailed over the nationality of the flag.

appeared unobjectionable but before the war had advanced very far it was discovered that it served to protect from capture ships flying neutral flags but which in fact were owned wholly or in part by persons or companies of enemy nationality.[1]

Sec. 277. Neutral Protests. Several neutral powers, however, protested against the abrogation by the belligerents of Article 57 and maintained that the rule which it enunciated was declaratory of an established customary rule of international law and was therefore as binding upon belligerents as any other customary rule of the law of nations. Thus the government of Argentina protested against the capture by a British cruiser of the steamer *Presidente Mitre,* which although owned by the German-Hamburg South American Line was engaged in the coasting trade of Argentina and had flown the Argentine flag for fifteen years, as it had a right to do under the law of Argentina. But it was to meet just such cases as this that led the British government to abrogate Article 57 which would have protected the *Presidente Mitre.* In view, however, of the fact that Argentina was largely dependent upon German-owned vessels for the carriage of its commerce, the British government released the vessel and agreed not to make further seizures of enemy-owned vessels sailing under the Argentine flag and engaged exclusively in the coasting trade of the country.

[1] See the comments of the London *Times* of Oct. 26, 1915, to the effect that the abrogation of the rule of Article 57 had "become necessary by the experience of the war." "The old rule elaborated by distinguished English and American judges, which made the character of the ship depend upon the character of the owner, and to which the British government now reverted, embodied," said the *Times,* "the national and common sense view and therefore when the Court was satisfied that there existed an enemy interest in a ship such interest would be liable to condemnation . . . a rule which even the Declaration of London maintained in respect to cargoes." Professor Holland, in a letter to the *Times,* urged the abandonment of the rule of Article 57. The flag, he asserted, was conclusive as to the character of the vessel only when it was an enemy flag. If it was a neutral flag it should be permissible to go behind the flag and inquire into the nationality of the owners. Professor Holland's statement that the enemy flag is conclusive as to the character of the vessel cannot be admitted, for it may, in fact, be owned by persons of neutral or allied nationality. The French ministerial report explaining the French decree of October 23, abrogating Article 57, pointed out that the absolute presumption which the flag established was too strict and that in fact it leads to "inexact solutions" because it may and does happen that vessels for commercial reasons register in time of peace under a flag which becomes an enemy flag in consequence of war and that in fact the owners may be subjects of a neutral or allied State. The French decree recognized this possibility when it declared that a vessel flying an enemy flag but which was owned by nationals of a neutral or allied country would be regarded as a neutral or allied vessel.

As to the particular reasons which led the British government to abrogate the rule of Article 57, see my *International Law and the World War,* Vol. I, pp. 196-200. See also the cases of the *Genesee, Hocking, Kankakee,* and *Solveig* (Sec. 284, *infra*).

Likewise the government of the Netherlands protested against the non-application of the principle of Article 57 by the British Prize Court in the case of the *Hamborn,* a vessel registered under the Dutch flag but owned by a company incorporated in the Netherlands.

Sec. 278. Views of Governments and Prize Courts as to the Meaning of Article 57. The views expressed by the various Prize Courts or by governments regarding the import of the rule that the national character of vessels shall generally be determined by the flag may be grouped under four heads.[1] First, the rule may be regarded as an enunciation of the principle that if in respect to cargoes ownership constitutes the normal criterion of their enemy or non-enemy character, that test has no importance in the determination of the enemy or non-enemy character of ships and that the sole criterion admissible is the nationality of the flag. This view was that which was adopted by the German Prize Court[2] and by that of Austria-Hungary.[3] Second, the rule may be understood as an expression of the idea that if the enemy or non-enemy character of both ships and goods can in principle be deduced from the fact of ownership, nevertheless the national character of ships should for practical reasons be definitely determined by the flag which they fly, which flag may be regarded as constituting an absolute presumption of the enemy or non-enemy character of the interests therein. This was the interpretation of Article 57 which the French government criticized in the Ministerial report of October 23, 1915, referred to above as one which leads to "inexact solutions."

In the third place, the flag may be regarded as constituting a legal presumption as to the enemy or non-enemy character of the ship, which presumption may be rebutted by proof to the contrary showing an ownership different from that indicated by the flag. This was the rule adopted by the French government in the decree of October 23, 1915, referred to above, and by the Russian government in the ukase of February 17, 1916. Finally, in the fourth place, the flag may be regarded as constituting only one of several criteria by which the national character of a

[1] I am indebted to Verzijl (*op. cit.*, p. 342) for this classification.
[2] Case of the *Island,* I *Entsch.* 8.
[3] Case of the *Mukhbir-i-Sürur* and the *Halil, Normal Verordnungsblatt für die K. u. K. Kriegsmarine,* 8 Stück, p. 35, and 18 Stück, p. 54. In these German and Austro-Hungarian cases it was declared that the nationality of a ship is determined by the flag which it has a right to fly and not by the nationality of the owner.

ship may be determined. Thus while national character is generally inferred from ownership it is unnecessary to inquire into the fact of ownership when enemy character may be deduced directly from the enemy flag which the vessel flies, it being immaterial in such case what are the interests covered by the flag. In other words the flag is conclusive if it is an enemy flag and the Prize Court will not go behind it to ascertain who are the real owners.

Sec. 279. Date at Which Enemy or Neutral Character Attaches. The Prize Courts were on various occasions called upon to determine the date from which the enemy or neutral character of ships had to be reckoned. Was it the character possessed at the moment of capture or that possessed at the time the judgment of the prize tribunal was pronounced? In the majority of cases the former date was the one regarded as conclusive. In such cases changes of national character which the vessel underwent subsequent to the date of capture, either as a consequence of transfer of flag or as a result of municipal legislation, were held to be without effect upon the rights of the captor or upon those of the claimants. This was the rule adopted by the French Prize Council which held that no change in the national character of a ship made subsequent to the moment of capture either for the purpose of depriving it of its enemy character or reinvesting it with such character, would be recognized by the Prize Council. Thus in the case of the *Ariadne No. 1*,[1] a vessel belonging to German subjects but flying the French flag in pursuance of French registry obtained some years before the war and which was captured prior to the French abrogation of Article 57 of the Declaration of London, the Prize Council held that the withdrawal of the "françisation" of the vessel on May 21, 1915, subsequent to its capture, was without effect. The national character of the ship was held to be that which it possessed at the moment of capture; at that moment it was registered as a French ship and was not therefore liable to capture under the rule of Article 57 which was still in effect. In these circumstances there was no place for the Prize Council, it was said, to inquire into the question of the ownership of the vessel. To determine the legality of a capture, said the Council, the civil status and character of the ship at the date of capture must be considered; changes, sales, transfers, registration, or withdrawals of registry subsequent to that

[1] **Fauchille, *Jurispr. Franc.* 109.**

date were without effect upon the right of the captor or the owners.[1]

These decisions were in favor of enemy owners of vessels which were protected by the French flag. But in the case of the *Solveig*[2] the application of the same rule resulted in the condemnation of an enemy-owned vessel which had been sold to the American Transatlantic Company (alleged to be a company financed by German capital), prior to its capture in June, 1915, but which did not obtain American registry until a month and a half subsequent to its capture. Again the French Prize Council held that "in conformity with a generally recognized and applied principle of the law of nations" it was the neutral or enemy character of a vessel *at the date of capture* that determined its liability to condemnation and all changes in its national character subsequent to that date were without effect. Therefore, since the vessel had no right to fly the American flag at the time it was captured (the American government had at first expressly refused to register it), although it acquired such a right a month and a half later, it could not be considered as a neutral vessel. Likewise in the case of the *Tolna*,[3] where the owner claimed that his ship possessed American nationality but the certificates presented in support of his allegation were of a date subsequent to the date of the declaration of war and some of them even subsequent to the date of capture, the French Prize Council reaffirmed its view that national character for the purpose of determining liability to condemnation is that which the vessel possesses at the moment of capture. It applied the same rule and declared illegal the capture of the *Au Revoir*,[4] made on November 3, 1914, when it was flying the French flag, before the decree abrogating Article 57 but which was judged on February 14, 1916, after French registry had been withdrawn from the vessel because of enemy interests in its ownership and when Article 57 had ceased to protect it. But the fact that the Prize Council had declared illegal the capture of a ship for the reason that it did not at the date of capture possess enemy nationality did not prevent it from subsequently condemning the same ship under a different name, following a new

[1] To the same effect see the *Bon Voyage* No. 1, the *Flamanville* No. 1, and the *Willkommen* No. 1, Fauchille *Jurisp. Franc.* 112, 113, 115.

[2] *Ibid.*, 126. Decision affirmed June 22, 1922, by decree of the President of the Republic upon the advice of the Council of State, text 30, *Rev. Gén. de Droit Int. Pub., Documents*, 33. See Sec. 323, *infra*.

[3] 27 *Rev. Gén.* (1920), *Jurispr.* 90.

[4] Fauchille, *Jurispr. Franc.*, 215.

capture made after it had lost its non-enemy character. The contention of the claimant that this was a case of *res judicata* (*chose jugé*) and therefore the Council was without jurisdiction, was rejected on the ground that the second capture was a separate and distinct operation from the first and was made during the course of a new voyage.[1] It may be observed that the rule enunciated by the French Prize Council in the case of ships was contrary to that generally followed by the prize tribunals for determining the validity of the capture of cargoes. Thus where goods non-enemy in character at the date of capture were transferred to enemy persons subsequent to capture, the Prize Courts usually held that the effect was to deprive them of their non-enemy character.[2]

It does not appear that the Prize Courts of Great Britain or Germany had occasion to pass upon the question of the date from which the enemy or non-enemy character of ships must be reckoned, but considering the opinions which they reached in regard to the same question in connection with cargoes there is good reason to believe that they would have applied the same rule in the case of ships, contrary to the jurisprudence of the French Prize Council.[3]

II

When Flag Is and Is Not Conclusive as to Nationality

Sec. 280. Flag as Test During the Régime of Article 57. Prior to the abrogation of Article 57, it was only when a captured ship had no right to fly the national flag of any state or when it carried no official documents attesting its nationality, did the French Prize Council take into consideration the fact of ownership as a subsidiary criterion for determining its nationality.[4]

[1] The *Victore ex-Virginia*, *ibid.*, 260. The *Virginia*, as it was known at the time of its first capture, flew the American flag, although it was not registered in the American merchant marine. But according to American legislation it had the right to fly the American flag if it had on board a consular certificate attesting that it had been transferred in good faith to an American company. At the time of capture it had such a certificate and although there were enemy interests in the vessel, the Prize Council held that it must be considered as an American and therefore a neutral ship, in virtue of the flag which it flew and which it had a right to fly.

[2] See Sec. 365, *infra*.

[3] Compare the observations of Verzijl, *op. cit.*, p. 345.

[4] Compare the case of the *Solveig* referred to above, a vessel claiming to be neutral (American) but which carried no documents aboard to establish

So long as that Article was in effect the nationality of the flag was considered as the sole test of whether the ship was enemy or neutral; and as has been pointed out, enemy owned vessels were frequently released because they had a right to fly and were flying the French flag.

The British Prize Court apparently was not called upon during the period when Article 57 was in effect to pass judgment upon the validity of the capture of enemy-owned vessels flying and having a right to fly the British flag. It is true that the Prize Court in October, 1914, when Article 57 was still in effect, condemned two German owned vessels, the *Tommi* and the *Rotherstand*,[1] flying the British flag but the condemnation was based on the view that they had no right to fly the British flag, since their transfer to British registry was not regarded as valid. Even if the transfer had been recognized as legal and consequently their right to fly the British flag admitted, it is doubtful whether the flag would have been considered as a protection, in view of the large enemy interests in the vessels. Sir Samuel Evans, adverting to the British Merchant Shipping Act of 1894, which prohibits alien ownership of vessels registered in the British merchant marine, said he was not called upon to decide the question whether a company consisting entirely of aliens could own a British ship but that he did not want it to be assumed that the Prize Court, looking at the realities of the thing, could not say that even if the transfer had been completed the two vessels ought not to be regarded as German ships. This view was reaffirmed by Sir Samuel in the case of the *Poona*, decided in May, 1915.[2] It seems quite clear that in cases involving the validity of the capture of enemy-owned ships flying and having the right to fly the British flag, the British Prize Court would have reached a different conclusion from that reached by the French Prize Council and would have denied the protection of the flag to such vessels.

Sec. 281. British Interpretation. Neutral Flag Not Conclusive Even When Article 57 Was in Effect. With the abrogation of Article 57 by the Order in Council of October

its right to fly the American flag but which carried, on the contrary, documents indicating that it was an enemy ship. See also the cases of the *Seyhoun* and the *Cydnus* (Fauchille, 174)—tugs flying no flag at the time of capture, and carrying no papers to establish their right to fly any flag; and the case of the *Lloyd* (*ibid.*, 117), where the Prize Council stated that in the absence of a flag it would inquire into the fact of ownership in order to determine the national character of the vessel.

[1] II Lloyd 1; I Br. & Col. Pr. Cas. 16.

[2] II, *ibid.*, 291; I, *ibid.*, 275.

20, 1915, the British Prize Courts were free to apply the traditional rules of English prize law. Would the rule of Article 57 have to be applied in the case of a vessel captured in May, 1915, when the Article was still in effect but which came up for decision after the date of the abrogation of the Article? This question came before the Egyptian Prize Court in the case of the *Proton*,[1] a vessel flying the Greek flag (neutral) but in reality belonging to the German government which had furnished the money with which the Greek claimant had purchased it and for which he was a mere agent. She was captured on May 16, 1915, when Article 57 was still in force but the case came before the Prize Court in February, 1916, after the withdrawal of the Article. The claimants invoked the benefit of the Article and argued that the Order in Council subsequently revoking it could not be given a retroactive effect. Judge Cator thought the latter contention was correct but even assuming that Article 57 applied, the *Proton*, he said, was condemnable under Article 46 of the Declaration of London which declares that a neutral vessel shall be condemned if it is under the orders or control of an agent placed on board by the enemy government, as was the case of the *Proton*. He admitted that judged by the test of the flag, the *Proton* was undoubtedly a Greek ship and that the registered owner was a domiciled Greek but that even admitting that Article 57 was applicable, which he was willing to do, it did not protect from condemnation a vessel which had a right to fly a neutral flag but which was owned by an enemy government or by enemy subjects. Ownership of a vessel, he said, is "a continuing state, irrespective of particular action, and a legitimate subject for consideration by the Court at any time." He thought the Court was therefore entitled "to seek out the real owner, and if it finds him to be an enemy who has hidden himself with fraudulent intent behind the nominal proprietor, who is neutral, it will condemn the ship." He added that if he were bound by the flag and was obliged to say that the *Proton* was really a Greek ship and therefore neutral he would still condemn it on the ground that it was engaged in unneutral service. But he was of the opinion that the true ground of condemnation was that it was really an enemy ship and he was convinced that even if there were no exact precedents in point, the view was warranted by "the principles to be extracted from a long line of authority" that Article 57 was never intended to protect

[1] II Br. & Col. Pr. Cas. 105.

such vessels as the *Proton,* owned and controlled as it was by an enemy government.

Upon appeal, the judgment was affirmed by the Judicial Committee,[1] but merely on the ground that the vessel did not belong to the appellant and that his "purported ownership was a mere blind to conceal her character by continuing to fly the Greek flag." The Judicial Committee admitted that Article 57 was in force "at the material time" in the case, that is, at the time of capture, and therefore the subsequent abrogation of the article was not retroactive. Adverting to the decision in the *Zamora* case [2] that while the Crown cannot by Orders in Council prescribe or alter the law to be administered by a Prize Court, the Court would act on Orders in Council in every case in which they amounted to a mitigation of the Crown's rights in favor of an enemy or neutral, their Lordships said:

"Does then Article 57 prescribe the law to be administered by a Court of Prize or does it direct that the rights of the Crown are to be mitigated in favour of a neutral or of the enemy? In their Lordship's opinion, the former is the effect of the Article. It declares that a Court of Prize shall determine the character of a vessel alleged to be of enemy character by one single circumstance, the character of the flag she is entitled to fly, and not by the entire body of relevant circumstances which determine the truth as to that character. This is a positive prescription as to a material part of the law of evidence.

"Furthermore, the surrender of the rights of the Crown is a thing not to be inferred from doubtful language or from general considerations, especially in a case of fraud and in a matter so grave as the exercise of sovereign belligerent rights. The terms of this Article are little adapted to a waiver of His Majesty's rights in favour of others; they clearly purport to prescribe the law on a topic which has been the subject of many decisions. Their Lordships are of opinion that, notwithstanding the Order in Council, it is their duty, sitting in prize, to consider the facts proved, in order to ascertain what the character of the *Proton* really was."

The Judicial Committee might have taken the position that since Article 57 was an innovation upon the customary rule of the law of nations (see its decision to this effect, in the case of the *Hamborn*),[3] the Order in Council putting it into effect was not binding upon the Prize Court. But under the decision in the *Zamora* case that such orders are nevertheless binding when the effect is merely to mitigate the rights of the Crown in favor of enemies and neutrals, the Court was bound by Article 57 since it was admitted that it constituted a waiver of the rights

[1] VII Lloyd 208; III Br. & Col. Pr. Cas. 125.
[2] IV Lloyd 1; I Br. & Col. Pr. Cas. 309, and II, *ibid.*, 1.
[3] Sec. 282 *infra.*

of the Crown. The only way, therefore, to avoid the consequences of the Article, which it was admitted the claimant had a right to invoke, was to give it an interpretation which would defeat his claim, and this was done.

After having admitted that the rule embodied in Article 57 was applicable to the case of the *Proton* and having interpreted that rule to mean that a Prize Court should determine the character of a vessel by the single circumstance, viz., the character of the flag which it was entitled to fly, the condemnation of the *Proton* whose right to fly the neutral flag which it was flying at the time of capture was never denied, has been regarded by some authorities as wholly illogical.[1] It should be observed that while the Egyptian Prize Court condemned the vessel on the ground that Article 57 was never intended to protect vessels such as this, the appeal from the decision was dismissed by the Judicial Committee on the ground that the appellant not being the real owner had no *locus standi* to maintain an appeal. This being true, their Lordships did not consider it necessary to express an opinion on the other findings of the Prize Court.

In thus interpreting Article 57 during the period when it was admitted to be in force and therefore binding on the Prize Court, the jurisprudence of the British Prize Courts differed materially from that of the French Prize Council. The latter accepted the non-enemy flag as conclusive of non-enemy character and refused to inquire into the question of ownership, and on various occasions, as stated above, released enemy-owned vessels flying the French flag. The British Prize Courts, on the contrary, while admitting that Article 57 made the flag the sole test, affirmed their right to go behind the flag even when the Article was still in effect, and inquire into the fact of ownership and whenever they found that the flag (whether it was British or neutral) covered an enemy-owned ship they refused the protection of the Article.

It may be seriously doubted, as Judge Cator suggested, whether the Article was ever intended to protect enemy-owned vessels flying non-enemy flags; if it was so intended the rule which it enunciates can hardly be defended. Nevertheless, it was not entirely logical to hold that it made the flag the test and yet uphold the right of the Prize Court to go behind the flag when

[1] Verzijl, *op. cit.*, p. 154, characterizes the judgment of the Judicial Committee as being "almost incomprehensible from the point of view of logic" and that "in any case it is a striking example of the particular dialectics of British jurisprudence."

the article was still in effect, search out the owner, and condemn the ship if he was found to be an enemy. For this reason the decision of the British Prize Court was criticized.

The British interpretation virtually reduced the Article to a nullity so far as the protection of the neutral flag was concerned. The French interpretation was more in accord with the plain language of the Article but it sometimes resulted in the release of enemy-owned vessels. When, however, the Article ceased to be binding upon the British Prize Courts in consequence of its abrogation their right to go behind the flag and apply the ownership test could no longer be doubted.

Sec. 282. The Same. Case of the "Hamborn." The case of the *Hamborn*[1] (decided December, 1917), involved the question of the nationality of a vessel flying the Dutch flag and owned by a company incorporated in the Netherlands but of which the directors and shareholders were Germans. The company was managed by two German subjects residing in the Netherlands and the ship was employed in the import trade of Germany. The claimants invoked the protection of Article 57 of the Declaration of London. The Order in Council of October 20, 1915, abrogating the Article, was, they alleged, not published until October 26, the very day on which the *Hamborn* sailed from New York, and consequently the master had no opportunity to change the flag. They argued further that the place of the actual control and management of the ship was Rotterdam and not Hamburg and it was the actual and not the hypothetical or ultimate right of possible control which should be taken into consideration. Sir Samuel Evans, however, condemned the ship on the ground that it was in reality an enemy vessel. He observed at the outset that

"It is a settled rule of prize law, based on the principles upon which Courts of Prize act, that they will penetrate through and beyond forms and technicalities to the facts and realities. This rule, when applied to questions of the ownership of vessels, means that the Court is not bound to determine the neutral or enemy character of a vessel according to the flag she is flying, or may be entitled to fly, at the time of capture. The owners are bound by the flag which they have chosen to adopt, but captors as against them are not so bound. It has been said that 'it is no inconsiderable part of the ordinary occupation of a Prize Court to pull off this mask and exhibit the vessel . . . in her true character.' "—*Story's Notes on the Principles and Practice of Prize Courts* (Pratt's ed.), p. 62, and *per* Sir Wm. Scott in *The Fortuna* (1811) (1 Dodson, at p. 87).

[1] VII Lloyd 54; III Br. & Col. Pr. Cas. 81.

The question to be determined, he said, was whether the true character of the *Hamborn* was Dutch or German, that is, whether her owners were enemy or neutral subjects. After reviewing the facts relative to the character of the several companies which "appeared upon the stage in the history of the vessel," he concluded that no one other than an enemy subject was a director, manager, or shareholder in any of the companies and no person except a German, with the possible exception of one Hungarian, had any pecuniary or beneficial interest in the ship. He then asked if in view of these facts, the *Hamborn* was really a Dutch vessel. In his opinion there could be no doubt as to the answer. She was a German vessel belonging to German owners. Regarding the contention of the claimants that the vessel was protected by Article 57 of the Declaration of London he raised the question whether the Dutch courts would hold that she had a right to fly the Dutch flag. In any event, Article 57 had been abrogated by Order in Council and the Prize Courts were no longer bound by it. As to the date of the publication of the Order in Council abrogating the article, he thought that was immaterial. The fact was, the Article was not in force at the date of capture and therefore it afforded no protection to a ship which was really an enemy ship. Upon appeal the judgment of the Prize Court was affirmed by the Privy Council,[1] although Lord Sumner, who delivered the opinion of the Judicial Committee, apparently considered certain expressions in Sir Samuel's opinion as inapt, if not incorrect. Thus the president spoke of the *Hamborn* as being "nominally" owned by a Dutch company but that she "must be regarded as belonging to German subjects." He also quoted a statement of Sir Samuel from the judgment of Sir William Scott in the *Fortuna* regarding the duty of a Prize Court "to pull off the mask and exhibit the vessel in her true character." Lord Sumner declared that there was no mask to pull off, if by that it was meant some deception to be exposed.

"The appellant company really is," he said, "a Dutch company; the ship was bought before the war and really was the company's property. The company is not shown to be a nominee holding in trust for other persons. There seems to have been no disguise or concealment or attempt to delude either the captors or the Court, and, according to the municipal law applicable, namely that of Holland, the appellants are a Dutch corporation, and the ship is theirs and enjoys the rights and is subject to

[1] VII Lloyd 67; III Br. & Col. Pr. Cas. 380.

the obligations which attach to a Dutch ship. Evidently there is some inaccuracy, no doubt inadvertent, in the language employed by the President, and on this the appellants' argument is rested."

He emphasized especially the fact that the *Hamborn* was engaged in enemy trade. She was bought and employed as a useful tender to the German iron industry in the Ruhr, her other trade being auxiliary, and her Dutch flag, Dutch ownership, and local management at Rotterdam were adopted merely for the convenience of her German import trade. It was this rather than her flag, or the place of incorporation of the owning company, or the residence of her managers, or all these together, which stamped her with an enemy character. Regarding "certain aspects of the effect of using a national flag which are not now relevant and are really only false analogies," his Lordship said,

"If a ship for her own purposes has assumed and used a national flag, to which she is not really entitled, she may, in some circumstances, be held bound by the nationality which she has thus assumed without warrant. If a ship lawfully flies a national flag, she may, in some cases, be said, by a figure of speech, to derive from her flag the system of municipal law by which her contracts or her civil liabilities are governed. In the first case she cannot deny, as against captors, the national character which she has irregularly taken; in the second, she derives from the national character, which is actually hers and is indicated by her flag, the system of legal rights and liabilities applicable to her. Neither case touches the position where, in a question with captors, it becomes necessary to consider whether the ship, although in contemplation of technical municipal law a neutral ship, of neutral registry, and entitled to the benefits of a neutral flag, is, in view of the law of nations, a ship of enemy character and liable to be treated in accordance with that character. If the case turned on her user *de facto* at the time of her capture, it would be simple: so it would be if her owners were natural persons of neutral nationality *de jure*, neither adhering to the enemy nor allowing their chattel to be used in enemy service. The present case is more complex. The criteria for deciding enemy character in the case of an artificial person differ from those applicable to a natural person, since, in the nature of things, conduct, which is one of the most important matters, can in the former case only be the conduct of those who act for or in the name of the artificial person. It was decided in the case of *Daimler Co., Lim. v. Continental Tyre and Rubber Co., Lim.*[1] that, in the case of an incorporated company, the right and power of control may form a true criterion, the control, that is, of those persons who are the active directors of the company and whose orders its officers must obey, or the control of those persons, who in their turn are the masters of the directorate and make or unmake it by the use of the controlling majority of votes. The application of this test presents

[1] [1916], 2 A. C. 307.

no difficulty here, for no living person and no sentient mind exercised or possessed any control over the Hamborn Steamship Co., except persons and minds of enemy nationality. The residence of the two German managers in Rotterdam, if not altogether immaterial, at any rate cannot affect the result, since the question is not one of trading with enemy subjects, resident or carrying on business in a neutral country, but is one of the character of an artificial *persona*, whose trade is carried on for it under the supreme direction and control of enemies born."

Regarding the contention of the appellants that the ship ought to be accorded the protection of Article 57 of the Declaration of London for the reason that the publication of the Order in Council of October 20, 1915, abrogating it did not take place until the day of the sailing of the vessel on the voyage during which she was captured, Lord Sumner merely observed that down to October 20, 1915, the Crown waived its right to rely on other criteria than the flag but on that date the waiver was withdrawn. If the appellant company was unaware of the order its ignorance afforded no reason why the Crown should be compelled to continue to waive rights which in truth were in full effect.[1]

Sec. 283. The Same. Case of the "Edna." In the case of the *Edna*,[2] the British Prize Court was called upon to decide the question of the legality of the transfer of a German owned vessel from a Mexican company to American registry in October, 1915. The ship was captured by a British warship in January, 1916. The question was not therefore one which involved primarily the determination of the nationality of the ship. Nevertheless, the claimants contended that since Article 57 of the Declaration of London was in effect at the time the transfer was made, the vessel should be treated as being of Mexican nationality, because it was the Mexican flag which it flew and which it had a right to fly. Lord Sterndale, then President of the Prize Court, said in the course of his opinion that he would assume that he was "entitled to go behind the entity of the Mexican company and to look at the persons who were really concerned" and since the owner was a German subject he would

[1] The Dutch government protested against the seizure of the *Hamborn*. Verzijl, a Dutch jurist, thinks the protest, so far as it was based on the principle that the flag protected the ship, was not well founded for the reason that this principle was not an established rule of international law. Nevertheless, he thinks it was wrong for belligerents to alter during the war the rule (of Art. 57) which they had put into effect at the outbreak of the war, where the effect was to prejudice the rights of neutrals. For this reason he thinks that the condemnation of the *Hamborn* was not justified. (*Grotius, Ann. Int.*, 1917, pp. 125-126.)

[2] IX Lloyd 51; III Br. & Col. Pr. Cas. 407.

assume that the vessel was a German owned ship at the outbreak of the war. But holding that the transfer to a neutral registry before the capture was a valid transfer, he released the vessel. The judgment was affirmed by the Judicial Committee on appeal.[1]

Sec. 284. The Same. Cases of the "Kankakee," "Hocking," and "Genesee." In the cases of the *Kankakee, Hocking,* and *Genesee*[2] (decided by the British Prize Court in February, 1918), three ships alleged to have been owned by German subjects but which had been transferred to American registry were seized, while flying the American flag, by a British war ship after October 20, 1915 (the date of the abrogation of Article 57 of the Declaration of London), the claimants argued that as the ships had a right to fly the American flag they were protected by Article 57 and must be treated as neutral vessels. Sir Samuel held that even admitting that Article 57 applied, it would be subject to the provisions of Article 56 relative to the illegality of transfers made after the outbreak of war in order to evade the consequences of capture. This latter Article, he said, would still make it necessary "to take a step back for the investigation and determination of the question whether the vessels were enemy vessels before the transfer was effected." If it were necessary, he added, to decide this point, he would hold that "if Article 57 means to lay down a rule that a Prize Court must not exercise its functions of breaking through the shell or tearing off the mask of a merely colourable or bogus transfer in order to get at the real ownership, it is not valid or binding upon the Court." In other words Article 57 did not make the flag absolutely conclusive, for it expressly limits the rule by the provisions of Article 56 relative to transfers to another flag. However, in the present case it was not necessary to decide this point because Article 57, whatever its legal effect, did not really apply, because it had been abrogated before the capture of the ships, and hence their enemy or neutral character "must be determined in accordance with the rules of international law apart from any glosses or regulations incorporated in the Declaration of London." Regarding the non-conclusiveness of the flag upon the rights of captors, Sir Samuel said:

"According to international law it has long been established that, although a person who claims to be the owner of a ship is bound by the

[1] IX, *ibid.*, 70; III, *ibid.*, 926.
[2] VIII Lloyd 74. As to these cases see also Sec. 323 *infra.*

character fastened upon her by the flag, under which he has chosen to let her pass, captors are not affected by the flag, but are entitled to go behind it, and to show the true character of the ship by reference to the substantial interest in it, the effective control over it, and the real proprietorship of it. At this time of day, it seems, indeed, a work of supererogation to give the reasons or authorities for this principle of prize law."

Nevertheless in view of the importance of the cases and the "strenuous contest" made by the claimants he would state the principles which governed such cases. He then quoted from Sir William Scott's judgment in the case of the *Fortuna*,[1] as he had done in the case of the *Hamborn*, where it was said to be no inconsiderable part of the duty of a Prize Court to pull off the mask and exhibit a disguised vessel in her true character, a passage which, he said, had been "literally adopted by the greatest of American jurists in prize law—Mr. Justice Story."[2] Then after reviewing at length the long and involved transactions preceding the transfer to American registry he came to the conclusion that the transfers were merely colorable and that the beneficial interest remained in German subjects. Upon appeal the judgment of condemnation was affirmed by the Judicial Committee.[3] The appellants argued *inter alia* that the character of the vessels should have been determined in accordance with the rule of Article 57 which, it was contended, protected them from capture. But the Judicial Committee, without discussing the Article, evidently assumed that it did not apply since the captures had taken place subsequent to its abrogation.[4]

[1] 1 Dodson 81 (1811).
[2] *Principles and Practice of Prize Courts*, Pratt's ed., p. 62
[3] VII Lloyd 113; III Br. & Col. Pr. Cas. 379.
[4] The American Secretary of State in a communication of May 10, 1916, addressed to the British ambassador at Washington (Supp. to *Amer. Jour. of Int. Law*, Vol. 10, p. 145) protested against the seizure of the three vessels as "arbitrary and unwarranted," since they were "owned by an American corporation organized under laws which presumably are similar to British law respecting incorporation" and were registered under the American flag in accordance with laws similar to those of Great Britain. It was added that evidence had been presented to show that all the company's stock was owned by American citizens. The Secretary of State further stated that: "This government has observed that in a recent case a British Prize Court, applying an apparently well-established rule, condemned a vessel flying the German flag and refused an application of neutral claimants to establish that they were the beneficial owners, a subsidiary concern established according to the laws of Germany. The Court ruled that the fact sought to be proved would not benefit the claimants.

"This government has also observed that the British authorities have in several instances requisitioned vessels flying the British flag, although the entire beneficial interest in them was owned by American citizens, and in connection with requests on the part of such beneficial owners, for the release of such vessels, the British government apparently has taken the position that the vessels, flying the British flag and being owned by British

Sec. 285. Roumanian and German Jurisprudence. The Roumanian Court of Appeal, overruling the judgment of a lower court, adopted a different view from that of the British Prize Court and refused to condemn a tug boat flying the Roumanian flag but which was apparently owned by an enemy subject (Austrian).[1]

Likewise, the German Supreme Prize Court, overruling the Prize Court at Hamburg, released a vessel flying as of right the Dutch flag and belonging to a Dutch company but the interests in which were owned wholly or in preponderating part by enemy subjects.[2] This decision appears to have been directly the opposite of that of the British Prize Court in the case of the *Hamborn.*

Sec. 286. British Flag Not Conclusive as to National Character. In the case of the *St. Tudno,*[3] a vessel nominally owned by a British company and registered as a British vessel but which was really owned by the German Hamburg-American Line which controlled the British company, and which was seized in December, 1915, after the abrogation of Article 57, Sir Samuel Evans said he had a right and was bound "to look at something beyond the nominal ownership." The whole control and dominion over the ship, he said, were vested in and exercised by the Hamburg-American Line, which was well known to be a great German corporation with its center of business in Hamburg. "Apart from technicalities," he added, "could anybody say that this ship belonged to a British company? If it did in name belong to a British company, that covering was the merest shell, and I must break through it in order to ascertain who the real owners of the ship were." It was clear, he said, from the decision of the House of Lords in *Daimler Co.* v. *Continental Tyre and Rubber Co.*[4] that the place of the regis-

corporations, must, of course, be regarded as British and not American vessels.

"It appears, therefore, from different cases of the character just mentioned, that the British judicial and administrative authorities have as a rule attached no importance to beneficial ownership in determining the nationality of the vessels owned by corporate organizations but have uniformly proceeded on the theory that nationality in each case must be determined by the flag the vessels fly or by their corporate ownership." On the other hand, it was complained that the British authorities were now seeking to condemn the *Kankakee, Hocking* and *Genesee,* which "are owned by an American corporation and fly the American flag, on the ground, as they state, that they believe these vessels to be, entirely or to a large extent, enemy owned, apparently attach great importance to beneficial ownership and no importance to the flag or corporate ownership."

[1] Case of the *Emilie,* cited by Verzijl, p. 393.

[2] The *Gelderland,* 2 *Entsch.* 211.

[3] V Lloyd 198; 2 Br. & Col. Pr. Cas. 272.

[4] [1916] 2 A. C. 307.

tered office of the company does not determine its principal place of business. He added that if the case had come before him upon an application by the proper officials for the forfeiture of the ship on the ground that a British ship could not be owned by aliens because the principal place of business was not in England, he would decree its forfeiture. This was only another way of saying that he had come to the conclusion that "the name of the British company was a mere name; that to the very minutest particular there was no kind of beneficial ownership in anybody except the Hamburg-American Line." The question which he had to determine was whether she was an enemy ship at the time of seizure and that question must be answered in the affirmative.

Sec. 287. But Enemy Flag Is Conclusive as to Enemy Character. While the British Prize Court refused to regard the flag as conclusive when it was a British or *neutral* flag, even during the period when Article 57 was in force, when it was an *enemy* flag it was regarded as conclusive. Thus in the case of the *Tommi* and the *Rotherstand*,[1] decided in October, 1914, Sir Samuel Evans condemned two vessels primarily on the ground that the flag they were entitled to fly and which they were actually flying at the time of capture was the German flag. There was another reason for the condemnation, but Sir Samuel declared that the fact that they were flying the German flag, the only flag they were entitled to fly, was in itself a sufficient reason for condemnation. "The law as it was understood," he said, "which says that the nationality of a ship depends upon the flag, was adopted in the Declaration of London by the parties which agreed to the Declaration. It is stated at the commencement of the Declaration that the rules laid down correspond in substance with the generally recognized principles of international law."

Likewise in the case of the *Oriental*,[2] decided in March, 1915, Sir Samuel Evans said, "It is quite clear that according to the prize law of this country the nationality of a ship is determined by the flag."[3]

"That was laid down by Lord Stowell long ago in the case of the *Vrow Elizabeth*, and was given effect to by Dr. Lushington in the case of

[1] II Lloyd 1; Br. & Col. Pr. Cas., 22.
[2] I Lloyd 360.
[3] The learned judge obviously meant this to be true only when the flag was that of an enemy, since he had already held that it was not necessarily the case where the flag was British or neutral.

the *Industrie,* and a similar provision will be found in the Declaration of London, which can be referred to as illustrating the way in which this matter has been looked at. The report of M. Renault on Article 57 of the Declaration of London runs as follows:

> " 'From more than one point of view ships may be said to possess an individuality; notably they have a nationality, a national character. This attribute of nationality finds visible expression in the right to fly a flag; it has the effect of placing ships under the protection and control of the State to which they belong; it makes them amenable to the sovereignty and the laws of the State, and the surest test of whether a vessel is really a unit in the merchant marine of a country, and here is, therefore, the best test by which to decide whether her character is neutral or enemy. It is, moreover, preferable to rely exclusively upon this test and to discard all considerations connected with the personal status of the owner.'

"Now the test, according to the Declaration of London, was what flag she was entitled to fly. Here I must assume against the ship that, as the ship was flying the Hungarian flag, she was flying the flag which she was entitled to fly."

The claimants were a Swedish subject and a Hungarian who affirmed that they were the joint owners. The vessel was manned by a Swedish crew and commanded by a Swedish captain. The claimants admitted that she flew a Hungarian flag but contended that she was a neutral vessel (Swedish). Sir Samuel disposed of this contention by the statement that "clearly on the ship's papers and clearly *by reason of her flying the Hungarian flag she belonged to Hungary.*" [1]

In the case of the *Leda,*[2] decided in November, 1914, by the supreme court of Bermuda, sitting in prize, the claimants sought to avoid the consequences of Article 57 by arguing that its effect was destroyed by Article 43 which exempts from condemnation an enemy vessel (and its cargo) encountered at sea while unaware of the outbreak of hostilities, as the *Leda* was alleged to have been, or while ignorant of a declaration of contraband.

[1] This declaration is criticized by Mr. Thos. Baty in the *Law Magazine and Review,* 1915, p. 346. Compare also the observations of Verzijl, *op. cit.,* p. 357. Mr. Baty observes: "That she was flying a Hungarian flag is clearly an immaterial circumstance. There is no 'Hungarian' flag; the national tricolor is not worn by merchantmen and its display is a mere ornamental decoration. Captors were allowed to adduce evidence that the word 'Hungaria' was partly decipherable on her stern. This is of doubtful propriety; but in any event, there is nothing to prevent a Swede from calling his yacht *Hungaria,* especially if she is part owned by a Hungarian son-in-law. She had a Swedish master and crew and was entered in a Swedish yacht club. In these circumstances the most that could have been done was . . . to condemn the moiety of the Hungarian part owner."

[2] I Br. & Col. Pr. Cas. 283.

The Court, however, held that Article 43 applied only to ships, other than enemy vessels, having contraband on board. An application having been made for further proof on behalf of a neutral company in order to establish that they were the beneficial owners of the vessel, in that they owned the entire capital stock of the nominal owners, a subsidiary German company, it was refused on the ground that a ship, "built in Germany, with a German register, registered in the name of a German company, carrying on business in Germany, with German ships' papers, commanded by a German master, manned for the most part by Germans, flying the German flag, could not be considered anything else but a German ship, even if the actual stock of such a German company belonged to individuals or to a company of a neutral state." In short, the fact of beneficial ownership which the claimants asked to be allowed to prove would not help them if it were established, since the ship was German by its flag, by its operation and by the business in which it was engaged.[1]

In this case, unlike the *Proton,* it was an enemy rather than a neutral flag which the ship flew. In the case of the *Proton* it was held that a neutral flag is not conclusive as to the national character of the vessel and that the Prize Court may go behind the flag and ascertain who are the real owners; in the present case, however, it was held that the flag is conclusive when it is an enemy flag, and it is immaterial who are the owners. In such a case the Prize Court will not go behind the flag or permit neutral claimants to produce evidence to show that they are the beneficial owners.

From the above mentioned decisions of the British Prize Courts it will be seen that according to their interpretation, a non-enemy flag, whether British or neutral, was never regarded as conclusive as to the non-enemy character of the ship—not even when Article 57 of the Declaration of London was in effect and admitted to be binding. On the other hand, the enemy flag was held to be conclusive as to enemy character, and claimants were not allowed to produce "further proof" to establish neutral ownership.

Nevertheless in the later case of the *Kara Deniz,*[2] decided in July, 1922, the Judicial Committee apparently relaxed from the somewhat rigorous doctrine enunciated in the case of the *Oriental* that the flag is conclusive as to national character when it is

[1] The ship was, however, released by the Crown as an act of grace.
[2] X Lloyd 355; III Br. & Col. Pr. Cas. 1070.

an enemy flag. In the present case a ship flying the Turkish flag and documented as a Turkish vessel entered the British port of Bombay before the outbreak of war between Great Britain and Turkey. A few days after her arrival the *Kara Deniz* hoisted neutral colors, it being alleged that the owner was a neutral subject by naturalization although he continued to reside in Turkey, where he was born. Since the ship was documented as a Turkish vessel when it entered port and was flying the Turkish colors the Prize Court might have regarded that as conclusive as to its character as was done in the case of the *Oriental*. But instead of this it relied only upon the domicile of the owner. The claimant having failed to discharge the burden of proof which was upon him to satisfy the Court that his Turkish domicile had been abandoned, his vessel was held to be an enemy vessel—not because it was registered as such and flew an enemy flag, but because he was domiciled in an enemy country.

Sec. 288. Italian Jurisprudence. The Italian Prize Commission held in a number of cases that the enemy character of vessels must be determined by their nationality and not by the nationality of the owners and that the former is determined by the nationality of the flag which they are entitled to fly. Applying this test the Commission condemned various ships and tugs flying the Austro-Hungarian flag and owned by Austro-Hungarian subjects who nevertheless were Italian by race and sympathy.[1]

Sec. 289. Flag Which Vessel Is Entitled to Fly, Not That Which It Actually Flies, Is Test. In applying the flag test for the determination of the nationality of ships the Prize Courts, with very few exceptions, based their decisions upon the flag which the vessel had a right to fly, as Article 57 of the Declaration of London lays down, rather than upon that which it was actually flying at the time of capture. Consequently, the

[1] See notably the cases of the *Nibbio*, *Aquileia*, and *Grado* (Fauchille et Basdevant, *Jurispr. Ital.*, p. 166) ; the *Cervignano et Friuli* (*ibid.*, p. 178) ; the *Leonilda* and *Ottilia* (*ibid.*, p. 194) and the *Nove e Galleggianti Catturati lungo l'Isonzato* (cited by Verzijl, p. 353). Compare also the case of the *Eugenia* or *Lombardia* (Fauchille et Basdevant, *Jurisp. Ital.*, 471), where the Italian Prize Commission said that while the legislation of some other countries permitted the nationality of ships to be determined by that of the owners, the law of Italy (Art. 17 of the prize regulations) allowed the nationality of the owner to be considered only when the ship had no right to fly any flag. Again it said, it is not simply the nationality of the owner that the Prize Commission must determine, but it is before all the enemy character of the ship itself, which depends upon the flag it has a right to fly, that the commisssion must determine. See also an identical decision in the case of the *Atlanta* (or *Stella Polare*), (*ibid.*, 435).

flag which is in fact flown constitutes only a presumption, which, however, is rebuttable, of its right to fly it. In the case of the *Island*,[1] a Danish vessel which in October, 1915, was captured by an English warship and later put into the service of the British admiralty under the British flag without the validity of the capture having been passed upon by the Prize Court and which in July, 1916, was released by the admiralty upon condition that it serve an English shipping company in carrying freight for a period of twelve months, and which was during this period captured by a German warship while it was flying the Danish flag, the German Prize Court took occasion to say that it could take account of the fact that the vessel had previously flown the British flag only in case it had acquired the legal right to fly that flag. Since the capture by the British had not been the object of prize adjudication its right to fly the British flag had not been established. It did not follow from the mere fact that the English had operated the vessel under the British flag against the will of the owner that it was entitled by legal right to fly that flag and consequently it was not a matter of which the German Prize Court could take notice.[2]

In several cases decided by the Chinese Prize Court involving the validity of the capture of German ships found in Chinese ports at the outbreak of the war between China and Germany, it was contended, *inter alia*, by the claimants that the captures were unlawful because the ships were not flying the German flag at the time of capture, it having been removed at the time the vessels were taken into custody. But the Prize Court disposed of this contention by the observation that since the vessels had flown the German flag, which was the flag they were entitled to fly, they were of German nationality and that nationality was not lost through the taking of the vessels into custody and the removal of the German flag. And it added: "for the flag merely indicates the ship's nationality, which, until effectively changed, would remain the same, whether or not the ship for the time

[1] I *Entsch.* 8.

[2] See also the complicated case of the *Mukhbir-i-Sürur* decided by the Austrian Prize Court (*Normal verordnungsblatt für die K. u. K. Kriegsmarine*, 8 *Stück*, 1915, p. 35), which was flying no flag at the time of its capture but which had previously flown in succession the Turkish, Albanian, and Montenegrin flags. The Prize Court observed that the ship was registered in the merchant marine of Albania, which had no generally recognized commercial flag, in consequence of which the vessel was obliged to fly either the Turkish or Montenegrin flag, for, the Court added, "the nationality of a ship is not that of its owner but that of the flag which it is entitled to fly."

being was actually flying the flag of the nation concerned." [1] The *Solveig*,[2] a German owned vessel flying the Norwegian flag at the time of its capture by a French warship but which had been sold during the course of its voyage to a Danish subject in consequence of which its Norwegian nationality was lost, was condemned by the French Prize Council for the reason that there were on board at the time of capture no documents establishing its right to fly a neutral flag, the certificate of registration in the Norwegian merchant marine having been sent by the captain to the Norwegian consul at Marseilles. It was not therefore the flag actually flown but the flag which the ship was entitled to fly which determined its enemy or neutral character and in this case, that being the German flag, the ship was condemned. But the right to fly a particular flag may not be conclusive as to the enemy or neutral character of a ship. Thus the French Prize Council held in the case of the *Kypros ex Maine* [3] that an authorization accorded to an enemy ship to navigate in the interest of the revictualment of France and consequently to fly the French flag had only a "special weight" and did not withdraw from the vessel its enemy character and therefore prevent the Prize Commission from upholding the validity of its capture as an enemy ship.

Sec. 290. Test When Vessel Has No Right to Fly Any Flag. While the Prize Courts generally proceeded on the principle that in determining the enemy or neutral character of a ship the nationality of the flag which it has a right to fly is the primary test, none of them, even during the period when Article 57 of the Declaration of London was in effect, considered that a ship was necessarily non-confiscable if it did not fly an enemy flag. It happened in a number of instances that ships were captured, when because of special reasons they did not have at the time the right to fly the national flag of any state. The Italian Prize Regulations of March 25, 1917 (Art. 17), foreseeing this eventuality, provided that in such case the Prize Commission should consider the nationality of the owner and this rule was in fact followed by the Prize Courts generally in cases of this kind.[4] If the enemy or neutral character of the

[1] The *Sikiang*, the *Deike Rickmers* and the *Fortuna*, *Judgments of the High Prize Court of the Republic of China*, pp. 48, 52, 81.
[2] Fauchille, *Jurispr. Franc.* 126.
[3] 28 *Rev. Gén.* (1921), *Jurispr.* 18.
[4] See, for example, the case of the *Maurice* (30 *Rev. Gén.*, 1923, *Jurispr.*, p. 8), where the French Prize Council held that a boat whose right to fly the flag of any country could not be established, was confiscable by reason of enemy interests in its ownership.

vessel could not be determined either by the flag or other criteria it was treated as an enemy ship.[1]

Sec. 291. Ship's Papers as Evidence of Right to Fly Particular Flag. In general, evidence of the right to fly a particular flag is found in the papers which the ship carries. In case these do not establish conclusively the nationality of the ship it is presumed to be an enemy ship.[2] However, the Prize Courts usually permitted the claimants to produce extrinsic evidence to rebut the presumption.

In the case of the *Davanger*,[3] a Norwegian vessel sunk by a German submarine, the German Prize Court observed that it was not necessary that the ship's certificate should be on board in order to establish indubitably its nationality. "Naturally," it said, "the proper means of proving its nationality is to produce the certificate and that is why Article 11 of the prize code recognizes the impossibility of determining nationality in default of this document. One may, it is understood, imagine also the case where the certificate being on board is not presented [to the captor] or even if it is presented there is doubt as to its meaning or genuineness. In both cases, although the certificate exists, it may be impossible to determine the nationality of the ship therefrom." In this case the Prize Court had admitted as evidence a deposition of the commander of the submarine that at the time of capture the certificate was not delivered to him by the officer of the *Davanger*, and also a letter of the Norwegian consul at Leith stating that the captain had delivered the certificate to him. The Court held that since the papers necessary to the determination of the nationality of the ship had not been delivered to the commander of the submarine it was not possible to establish at the moment of capture its nationality in an indubitable manner and it must therefore be treated as an enemy ship.[4]

Sec. 292. Absence of Flag or Papers. In various Austro-Hungarian cases, where the ship flew no flag or where no papers were found aboard or where, as in the cases of sinking by sub-

[1] Article 11 of the German Prize Code so declares.

[2] The German Prize Code (Art. 11) provides that in case the nationality of a vessel cannot be determined from the papers which are usually required to be carried, it shall be treated as an enemy vessel.

[3] II *Entsch.* 232; Fauchille et De Visscher, 178.

[4] See also the similar case of the *Havlyst* (II *Entsch.* 237), a Norwegian vessel, the captain of which had taken the ship's papers with him at the time of its sinking, so that its nationality could not be established therefrom. See also the cases of the *Blommersdijk* (II, *ibid.*, 48) and the *Runhild* (II, *ibid.*, 196).

marines, the papers were lost with the ship, the Prize Court inferred the nationality of the vessels from various circumstances such as the presence of consular letters, the name of the home port, the name of the ship, etc.[1] According to ancient French legislation (ordinances of 1681 and 1778) the nationality of ships shall be determined from the papers on board, but except in a few especially aggravating cases the French Prize Council did not adhere rigorously to the ancient rule. An exceptional case of this kind was that of the *Rosita*,[2] a barque which flew no flag and carried no papers but all the passengers on which were enemy reservists endeavoring to return home to join the colors. Under these circumstances the Prize Council condemned it as good prize. Likewise a Bolshevist tug boat which flew the red flag but which carried no ship's papers or certificate of nationality and the captain of which fled on the approach of the French torpedo boat, was condemned by the French Prize Council in November 1920.[3]

In other cases where the ship flew no flag or carried no papers establishing its right to fly a particular flag its enemy character was, where possible, established by other circumstances, such as the presence of papers showing that it was owned by an enemy company,[4] the finding on board of an enemy national flag which the fleeing crew neglected to take with them,[5] information gained from interrogating the sailors,[6] the nationality of the patron and crew,[7] the presence of miscellaneous papers indicating enemy nationality, etc. The fact that a ship had flown an enemy flag, was held by the French Prize Council to constitute a strong presumption of enemy nationality, and this was strengthened when no claimant appeared to demand restitution.[8] But in the

[1] See among others, the cases of the *Mukhbir-i-Sürur* (*Normal Verordnungsblatt für die K. u. K. Kriegsmarine*, 8 *Stück*, 1915, p. 35); the *Fiore di Dulcigno* (*ibid.*, 15 *Stück*, p. 91); the *Hilussie* (*ibid.*, p. 92); the *Halil* (*ibid.*, 18 *Stück*, June 20, 1915, p. 54); the *Porto Said* (*ibid.*, 2 *Stück*, p. 12); the *Elisa* (*ibid.*, p. 13); the *Riposto* (*ibid.*, 7 *Stück*, p. 58); the *Gjovadje* and *Papagallo* (*ibid.*, p. 64). In the latter case the ships flew not the internationally recognized flag of Albania but that of Essad Pasha, who had declared war against Austria-Hungary. It was therefore treated as an enemy flag. In the case of the *Moravia* (*ibid.*, 11 *Stück*, Mar. 31, 1917, p. 135) the Prize Court upheld the validity of the destruction of an Austrian vessel which had been requisitioned by the Italian government, which flew the Italian flag and which had painted on it the name of the Italian home port.

[2] Fauchille, *Jurispr. Franc.* 108.

[3] The *Volea* or *Volia*, and the *Chalutier No. 20* (28 *Rev. Gén.*, 1921), *Jurispr.* 10.

[4] Cases of the *Seyhoun* (Fauchille 174) and the *Cydnus* (*ibid.*, 176).

[5] *Caïque X* (Fauchille 193).

[6] *Bautre X*; cited by Verzijl, p. 371.

[7] The *Sélimié* (Fauchille 211).

[8] The *Evangelistria* (*ibid.*, 281).

case of the *Persepolis*[1] the French Prize Council held that a ship must be regarded as having Persian and therefore neutral nationality if at the time of capture it was flying the Persian flag and had on board a *cahier* bearing the words "Empire of Persia, commercial marine," etc., and mentioning the word "passport," together with a document issued by the Greek consulate at Constantinople from which it appeared that the Persian claimant had purchased 51 per cent of the interest in the ship. Where there was doubt as to the nationality of the ship, the absence of papers establishing nationality was regarded as a legal presumption of enemy nationality but the French Prize Council admitted proof to show the contrary.[2] The Italian and German prize tribunals followed the same practice. In the absence of a flag or ships' documents establishing the right to fly a particular flag, the nationality of the vessel was determined on the basis of ownership where that could be established.[3]

III

Status of Non-Enemy Interests in Enemy Ships. Rights of Mortgagees, Lien Holders, Etc.

Sec. 293. The Traditional English Doctrine. When a vessel has been condemned for the reason that it is of enemy nationality what effect has the judgment of condemnation upon non-enemy interests in the vessel, such as those of non-enemy co-proprietors, mortgagees, holders of bottomry bonds (liens), advancers of loans, furnishers of supplies, etc.?

It is a general principle of prize law that all such interests follow the fate of the ship and are confiscated with it. As to the holders of bottomry bonds on enemy ships, Lord Stowell in 1804 affirmed that the Prize Court could not recognize them to the extent of allowing those who executed them to demand restitution of their interests in the vessel even when the holders were British subjects. The person who advances money on such bonds, he said, acquires by that act no property in the vessel; the property continues in the former proprietor who has given a right of action against it, but nothing more; those who lend

[1] *Ibid.*, 213. [2] The *Solveig* (*ibid.*, 126), and the *Lloyd* (*ibid.*, 117).
[3] See, for example, the Italian cases of the *Colon* (Fauchille et Basdevant, *Jurisp. Ital.*, 391), and the *Leonilda et Ottilia* (*ibid.*, 194) and the German case of the *de Brussels* (I *Entsch.* 310).

money on such security take the security subject to all the chances incident to it and amongst the rest, the chances of war.[1] During the Crimean war Dr. Lushington adopted the same view in regard to the rights of mortgagees of enemy ships.[2]

Sec. 294. Case of the "Marie Glaeser." The British Prize Courts during the World War followed the traditional English doctrine. In the case of the *Marie Glaeser*[3] (decided in September 1914) a German vessel captured on August 5, 1914, a claim was made by certain mortgagees, both British and neutral, that the Prize Court set aside a sufficient sum from the proceeds of the sale of the prize to satisfy the amounts due on the mortgages which they held. The neutral claimants contended that there was no case in which a British Prize Court had dealt with the claim of a neutral mortgagee in a sense adverse to the claim they were putting forward and that the decision of Lord Stowell in the *Tobago* case relating to liens was not applicable to mortgages, for the reason that mortgagees had some sort of "property" interest in the ship on which the mortgage was executed. In any case, they contended, the old law of prize should be extended and applied so as to protect neutral mortgagees in accordance with the policy and principle upon which the Declaration of Paris was founded. Regarding these claims Sir Samuel Evans said:

"Other claims were made on behalf of shareholders, mortgagees, and those who have made disbursements or rendered services. As regards the shareholders, if they are enemy shareholders their property must go with the capture of the vessel in which they have put their money. Not only is that so with regard to shareholders who are citizens of the German Empire, but it is equally true if they belonged to this country. If a shareholder invests his money in taking shares in a vessel which is liable to capture he takes that risk. In the case of a British shareholder, if he presents his case to the Crown for lenient treatment under the exercise of the prerogative of bounty, that is another matter. I have nothing to do with that. I am here merely to administer the law.

"What I have said as to the shareholders applies perhaps with greater force to those who have advanced sums of money, or rendered services, such as brokerage. As judge of the Prize Court, I cannot allow such claims. There is no reason to believe that the Crown will act with less generosity than in former times, and, as the solicitor-general has intimated, if such claims are put forward by British subjects, and if they are proved to be *bona fide*, no doubt they will be fairly considered."

[1] The *Tobago*, 5 C. Rob. 218; 1 Eng. P. C. 456. As to this see also Sec. 38, *supra*.
[2] The *Aina*, 1, Spinks, 8; 2 Eng. P. C. 247.
[3] I Lloyd 56; I Br. & Col. Pr. Cas. 38.

If the claim here put forward were allowed the result would be, Sir Samuel added, that captors would find themselves exposed to the disadvantage of having neutral liens set up to defeat their right of capture. All liens and other encumbrances of this kind must therefore be excluded by the Court. Capture of enemy vessels during war would be "a hazardous and almost worthless right of belligerents if captors were confronted with such claims as are put forward in this case, or if mortgages gave to mortgagees prior rights to those of captors." Here Sir Samuel quoted with approval from the decision of the United States Supreme Court in the case of the *Hampton* (5 Wall 372),[1] where it was said: "If such claims were recognized there 'would be an end of all prize condemnations' for 'as soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture would only have to raise a sufficient sum of money on them by *bona fide* mortgages to indemnify them in case of such capture.'" As to the contention of the claimants that there were no decisions in which the interests of neutral mortgagees had ever been confiscated by a British Prize Court, Sir Samuel called attention to Dr. Lushington's judgment in the *Aina* where although he held that the claimant was not a neutral, he expressly affirmed that even if he had been, his claim could not be sustained. The contention that mortgages were different from bottomry bonds, such as Lord Stowell dealt with in the *Tobago* case, Sir Samuel thought was not well-founded, at least so far as the function of the Prize Court was concerned. Likewise, the argument that a mortgage created some kind of property interest in the ship had no foundation in English municipal law whatever might be the principle of German law. If German law differed from English law in this respect it was a matter into which the Prize Court could not go.

After an extensive review of the authorities, Sir Samuel concluded as follows:

"The Court has no hesitation in pronouncing that upon the authorities, upon principle, and upon grounds of convenience and practice, the claim of the neutral mortgagees of this captured vessel must be rejected. The

[1] Sir Samuel also cited the American cases of the *Battle* (6 Wall. 498); the *Carlos F. Roses* (177 U. S. 655); the *Frances* (8 Cranch 18); the French case *der Turner* (Barboux, *Jurispr. du Cons. des Prises*, 76); the Japanese cases of the *Nigretia* and the *Russia* (Takahashi, *Int. Law Applied to the Russo-Japanese War*, pp. 551-3; 557-9); and among test writers Hall (6th ed., p. 498) and Westlake (II, 169), as authority for the view that encumbrances such as mortgages and liens on enemy vessels are not allowed to affect the rights of captors.

same conclusion would be arrived at if the claim were by British subjects. It need scarcely be added that the Crown, being entitled to captured property, may out of its bounty deal favourably with any such claims."[1]

Sec. 295. Other English Cases. The Prize Court for Egypt in the case of the *Emil*[2] (February 1915) applied the same principle, holding that British mortgagees of an enemy vessel were in no better position than neutral claimants. The judge said he had great sympathy for British subjects holding *bona fide* mortgages but that "it was now settled beyond the reach of argument that no person holding a mortgage, bottomry bond, or any other charge can set up any separate interest so as to defeat the claim of a belligerent to condemnation."

In the case of the *Leda*[3] the Supreme Court of Bermuda, sitting in prize, adverting to an application for further proof made on behalf of a neutral company to establish that it was the beneficial owner of the vessel stated that it did not understand that the company was claiming a lien on the vessel; if so it would be met by the decision in the case of the *Ariel*[4] where, on appeal, it was held that liens, whether in favor of a neutral on an enemy's ship or in favor of an enemy on a neutral ship, "are equally to be disregarded in a court of prize."[5]

In the case of the *Sturmvogel* and *Seadler*[6] a claim was put forward before the Supreme Court of South Africa (Cape of Good Hope division) by certain British companies for various sums alleged to be due it for supplies of coal and provisions furnished to two German whaling vessels which had been captured by a British war vessel. The Civil Court had decided that they had a statutory lien on the ships subject to any proceedings which might be taken or any rights which might be established in the Prize Court. A decision of the question by the Prize Court was, however, adjourned for the reason that the vessels were

[1] See further as to this case, Sec. 39, *supra*. This rule of prize law under which the interests of British mortgagees in enemy vessels are confiscable with the ship was justly criticized by the editor of the London *Solicitors' Journal and Weekly Reporter* (Vol. 58:833), who said at the time: "We regret Lord Stowell's decisions which have set the Prize Courts of the world on a wrong track and we cannot imagine any principle of convenience or probity which justifies the sacrifice of friendly or neutral mortgagees to the right of capture." Compare also to the same effect an editorial in the same *Journal* (Vol. 59:156).

[2] I Br. & Col. Pr. Cas. 257.

[3] I Br. & Col. Pr. Cas. 233.

[4] 11 Moo. P. C. 119; 2 Eng. P. C. 600 (1857).

[5] The *Leda* was subsequently released as an act of grace by the Crown (VIII Lloyd 459).

[6] Cases decided in the Prize Courts of South Africa, 29. Compare also the *Rufidji*., *ibid*., 77; and the *Hamm* and *Apolda*, *ibid*., 51.

given the benefit of the Sixth Hague Convention and were ordered to be detained until further order.

Sec. 296. The German Case of the "Fenix." The German Prize Court applied the same rigorous rule and confiscated national, allied and neutral interests in enemy vessels. In the case of the *Fenix*,[1] a Russian vessel captured by a German torpedo boat in August 1914, the claim of a German firm for certain disbursements made on account of the ship and the crew subsequent to its seizure was dismissed by the Supreme Prize Court. The claimant firm argued that it had acquired a preferential interest in the vessel by reason of the advances made upon the request of the captain and that the claim should be satisfied out of the proceeds from the sale of the ship, in case it were condemned. In the course of its opinion the Prize Court said: "It is not necessary to decide the question whether the firm had acquired a real right in the ship by reason of the advances which it had made. In any case such a right would become void by the confiscation of the ship. Capture, according to the law of prize, constitutes a mode of original acquisition, an *occupatio jure belli*, which according to the generally admitted principles of the law of nations, confers upon the occupant, free of all encumbrances, title to the thing condemned." This view, it was added, was that which the British Prize Court had adopted in the case of the *Marie Glaeser*. The Court concluded that the fact that the right here asserted by the claimant arose subsequent to the capture of the ship was a circumstance which in reality was without influence on the determination of the question. Moreover, the fact that the claimant was a German subject did not alter the situation, for there was no reason why an exception to the general principle should be made in favor of German nationals.

Sec. 297. Belgian Cases. In the case of the *Minna*,[2] a German ship captured by the Belgians in the port of Ostend, a Belgian national put forward a claim as co-proprietor of the vessel, but the claim was dismissed by the Belgian Prize Commission on the general ground that the claim of part ownership was not sufficiently established. The Prize Commission added, however, that even if the claim had been established it could not have been admitted, for the reason that "it is generally accepted in matters of prize that a co-proprietor of a ship navigating under an enemy flag and which has a right to fly that

[1] I *Entsch.* 1; Fauchille et De Visscher, *Jurispr. All.* 1. See also Sec. 211, *supra.*

[2] 47 *Rev. de Droit Int. et de Lég. Comparée* (1920), 139.

flag, cannot, if the ship is captured, assert a claim against the captor for his share of the co-propriety."

In the case of the *Agiena*,[1] originally a Dutch ship which had been captured by the Germans and condemned by the German Prize Court (November 1917) for carrying contraband, and which was recaptured by the Belgians in October 1918, a firm of English underwriters which had insured the vessel for the benefit of the Dutch owners between the date of capture by the Germans and the condemnation by the German Prize Court, put in a claim before the Belgian Prize Commission for the amount of the insurance which it had been obliged to pay in consequence of the German condemnation of the vessel. The firm contended that it had become subrogated to the rights of the Dutch owner, that is, the vessel had become its property and should be considered as flying the English flag at the date of capture by the Belgians. The Prize Commission, however, rejected the claim on the ground that the insurers could not have, as against the recaptor, more rights than the former Dutch owner had and it was immaterial that their title antedated that of the German prize judgment.

Sec. 298. Chinese Cases. In the Chinese case of the *Albenga Nos. 1 and 2*,[2] a German ship captured in a Chinese port by a Chinese warship after the outbreak of war between China and Germany, a Dutch and an English company presented to the Prize Court certain claims *in rem* against the ship for supplies furnished. The District Prize Court dismissed the claims and upon appeal to the High Prize Court the appellants thus argued:

"The Court also decided that the claim for performance of obligation is a right *in personam*, which cannot be enforced against the ship *in rem* and that it is not within the jurisdiction of the District Prize Court. According to established principles of law there are three kinds of debts that will create a claim *in rem* against the ship; viz., (1) cost for building the ship, (2) debts arising from a mortgage of the ship, and (3) price of goods supplied to the ship. The appellant's claim related to goods supplied to the ship and as coal supplied to a ship is like provision supplied to a person, any claim arising therefrom follows the ship. A ship is a kind of property having peculiarities like those of a fictitious person."

In dismissing the appeal the High Court said:

"But the main point of the appellant's claim is that a debt is due from the ship *Albenga* and that payment thereof should be enforced in his

[1] The *Moniteur Belge*, 1920, 405.
[2] *Judgments of the High Prize Court of the Republic of China*, 16, 20.

favour. This is beyond the jurisdiction of a Prize Court, which is solely concerned with the question whether or not a captured ship or cargo should be condemned; the question whether or not the thing condemned, or the owner thereof, is burdened with a debt being only a civil matter outside its jurisdiction. Moreover, according to international law a belligerent has an absolute right to what he has lawfully captured. Such acquisition being original in character is free from any right to the same thing that may exist in any third party; *a fortiori,* the existence of such rights cannot prevent a lawful capture."

In the case of the *Albenga No. 3*[1] a German company domiciled in Shanghai asserted a claim to the ship in consequence of a mortgage held by it on the vessel. In dismissing the claim the High Prize Court said: "The appellant seems to be ignorant of the fact that the mortgage maintained by him, assuming it to be genuine, can be enforced only against the master of the ship; it cannot be set up in the form of a claim in a Prize Court, nor can it be set up as a ground against capture; for the ship being of German nationality was lawfully captured."

Sec. 299. Italian Jurisprudence. The Italian Prize Commission adopted the same view. In the case of the *Myrza Blumberg,*[2] a German vessel captured by the Italian forces, a Dutch bank which held a mortgage on the ship, presented a claim to the Prize Commission for the sum of 1,350,000 marks which it had loaned the owners. But the claim was dismissed for want of jurisdiction. The right of capture, said the Commission, by which the sovereign power of a belligerent state is manifested, attributes to the captor full ownership in virtue of confiscation of the ship free of all encumbrance, even of mortgages held by third parties.

Sec. 300. French Jurisprudence. The French Prize Council like that of Italy was frequently called on to pass judgment in respect to the claims of third parties in cargoes on enemy vessels,[3] but there appear to have been no cases which involved similar claims against ships. Under the régime of legislation which existed between Oct. 23, 1915, and July 7, 1916, when the principles of ancient French prize law replaced those of the Declaration of London, non-enemy interests in ships flying an enemy flag were exempt by legislation from confiscation, but

[1] *Ibid.*, 25.
[2] Fauchille et Basdevant, *Jurispr. Ital.*, 393. The Italian Prize Commission was on various occasions called upon to decide questions involving the rights of mortgagees of cargoes found on enemy vessels seized in port at the outbreak of the war. See Sec. 335, *infra.*
[3] See Sec. 334, *infra.*

prize decisions on the point seem to be lacking. Nevertheless in the case of the *Barmbek* [1] although the question involved related to non-enemy interests in the cargo, the Prize Council stated that "a captor takes the ship as he finds it at the moment of capture with the *bénéfices de l'expédition;* that he cannot be regarded as a *concessionnaire* of the captured ship and that he is not bound by contracts between the owner, the charterer, and the shipper and to which he is entirely a stranger." It might be concluded that if the captor is not bound by encumbrances of this kind he would not be by those resulting from mortgages and liens. Substantially the same thing was said by the Prize Council in the case of the *Souhl, ex Corcovado* [2] where a claim put forward by a dock and warehouse company of Constantinople for a debt due it from the owner of the vessel was disallowed on the ground that a captor is not bound by contracts previously entered into by the owner or charterer.

Sec. 301. Status of Enemy Interests in Neutral Vessels. If non-enemy interests in a ship possessing enemy nationality are confiscable with the ship, is the contrary principle admitted, namely, are enemy interests in a ship of neutral nationality non-confiscable? So long as the belligerents regarded Article 57 of the Declaration of London as binding, this principle resulted as a logical consequence of the rule that the neutral flag determined the character of the vessel, but, as already pointed out, the Egyptian Prize Court in the case of the *Proton,* a vessel flying a neutral flag and captured before the abrogation of Article 57 the obligation to regard the neutral flag as conclusive as to the neutral character of the vessel which flew it was no longer binding and in fact vessels flying neutral flags were frequently confiscated for the reason that they were owned wholly or in part by enemy persons.[3] In brief, while non-enemy interests in ships flying enemy flags were regarded as confiscable with the ship, it was denied that enemy interests in vessels flying neutral flags were free from confiscation. The Prize Courts of some countries like China treated as enemy ships those flying neutral flags but the owners of which, or some of them, were enemy persons; those of Germany treated such vessels as enemy ships and confiscated them only when the owners were in major part persons of enemy nationality; those of Great Britain confiscated only the enemy interests and released the parts belong-

[1] Fauchille, *Jurispr. Franc.*, 279.
[2] 27 *Rev. Gén.* (1920) *Jurispr.* 60.
[3] See Secs. 281-285, *supra.*

ing to non-enemy co-proprietors. The courts of other countries, notably those of Austria-Hungary and Italy, confiscated non-enemy interests in ships flying enemy flags but released enemy interests in vessels legally flying neutral flags.[1] French cases involving precisely the status of non-enemy interests in ships flying enemy flags and of enemy interests in ships flying non-enemy flags, seem to be lacking so that it is not certain what the French Prize Council would have decided had such cases been presented to it.[2]

[1] Compare the case of the *Gorizia* (Fauchille et Basdevant, *Jurispr. Ital.*, 429), where the Prize Commission confiscated a ship flying an enemy flag but which was owned by persons of Italian nationality "subject to the dominion of the Austro-Hungarian Empire." See also the case of the *Eugenia* (*ibid.*, 471) and the *Spurma* (*ibid.*, 402).

[2] Compare Verzijl, *op. cit.*, p. 401.

CHAPTER X

NATIONALITY OF SHIPS (CONTINUED). TRANSFERS OF FLAG

I

Rules Governing Transfers

Sec. 302. Preliminary Observations. As was pointed out in the preceding chapter, a captured ship may be flying a non-enemy flag which it may have a right to fly according to the municipal law of the flag State and yet belligerents may refuse to recognize the right for the reason that the ship has been transferred from an enemy or prospective enemy register to a non-enemy (national or neutral) register contrary to the rules of international law governing the transfers of flag. Whenever war breaks out or has become imminent, the owners of vessels which are or would be exposed to capture by reason of their enemy character are always under a temptation to transfer them by sale, or otherwise, to a non-enemy flag in order to avoid the risk of having them captured and confiscated by the enemy.[1]

Sec. 303. Provisions of the Declaration of London. In the preceding chapter attention was called to the fact that while Article 57 of the Declaration of London makes the flag which a vessel is entitled to fly the test of its enemy or neutral character the Article expressly makes this rule subject to the pro-

[1] It may be observed that a change in the nationality of a ship may also result without there being a transfer of ownership. Thus after the outbreak of the World War various American-owned vessels registered under the German flag were transferred to American registry. Among them were the *Brindilla* and the *Platuria*, both of which were captured by British cruisers in October, 1915. The transfers here involved a change of flag but not of ownership. For this reason, apparently, the British government released them without submitting to the Prize Court the question of the validity of the transfers. The nationality of a ship may also be changed in consequence of a change in the nationality of the owner resulting from his naturalization or the cession of territory or the formation of a new State. See, for example, the case of the *Mercur* (27 *Rev. Gén.*, 1920, *Jurispr.* 69), a vessel belonging to a German subject of Schleswig, which territory, in consequence of the plebiscite under the treaty of Versailles, was returned to Denmark.

visions of the Declaration respecting transfers of flag. The flag is not therefore conclusive if it is a flag to which the ship has been transferred in violation of these latter provisions, which are to be found in Articles 55 and 56. They make a distinction between transfers of an enemy vessel to a neutral flag *after* the outbreak of war and those made *before* the declaration of war. The general rule laid down is that transfers made *after* the outbreak of war are void unless it is proved (the burden of proof being on the claimant if the capture is the subject of prize adjudication) that the transfer was not made in order to avoid the consequences of capture to which it would be exposed as an enemy vessel. This is, however, only a presumption, but it is absolute and therefore irrebuttable if the transfer has been made during a voyage or in a blockaded port, or if the vendor has reserved the right to repurchase the vessel or if the requirements of the municipal law of the State to whose registry it has been transferred have not been complied with. It would seem to follow therefore that if the transfer has been made in a neutral port where the vessel has taken refuge and the sale is unconditional and in conformity with the registration laws of the country to whose registry it has been transferred, the presumption that the transfer was made to avoid the consequences of capture is not absolute but may be rebutted by proof to the contrary. In other words it was not the intention of Article 56 to render illegal *all* transfers made after the outbreak of war, but merely to create a presumption of illegality which might in some cases be rebutted and in others not.

On the other hand, if the transfer is made *before* the outbreak of war the general principle (Article 55) is that the transfer is valid unless it is proved that the transfer was made to avoid the consequences of capture to which the vessel would be exposed in the event of war. Apparently the burden of proof here would be upon the captor and not upon the claimant, as is the case of transfers made *after* the outbreak of war. Nevertheless, Article 55 lays down a presumption that the transfer is invalid if the bill of sale is not on board a vessel which has lost her belligerent nationality less than 60 days before the outbreak of war. But this presumption may be rebutted by proof to the contrary, which must be produced by the claimant. The presumption of validity is, however, absolute in case the transfer has been made more than 30 days before the outbreak of the war provided the sale is unconditional, complete and "in conformity

with the laws of the countries concerned" and the vendor retains no control or interest in the profits of the vessel. It will be seen that the general presumption of the law—in some cases it is absolute—is in favor of the validity of transfers made before the outbreak of war but against those made thereafter, but in the former case there are particular circumstances under which the transfer is presumed to be void and in the latter particular circumstances under which it is presumed to be valid. In both cases the presumption is rebuttable under certain circumstances and irrebuttable under others.[1]

The purpose and effect of Articles 55 and 56 was to introduce international uniform rules governing transfers of flag in the place of the varying and conflicting rules and practices of States, and Article 56 especially represents, as Lord Sumner said in the case of the *Edna*, "an endeavor to find an acceptable compromise between English and Continental views on the point." [2] In this respect it is like various other provisions of the Declaration.

It may be observed that the Declaration of London deals only with transfers to *neutral* flags and not with transfers to belligerent or national flags. Likewise, its rules apply only to the transfer of merchant vessels and not to the transfer of public ships, transfers of the latter to neutral flags not being recognized as valid; nor do they deal with transfers of goods from one flag to another.[3]

Sec. 304. Status of Articles 55 and 56 During the World War. None of the modifications with which the Declaration was put into effect after the outbreak of the war touched Articles 55 and 56 dealing with transfers of flag.[4] In fact its rules relative to transfers of flag had already been, or were subsequently, incorporated in the prize codes or naval regulations of all the maritime powers except Great Britain, which promulgated no such code, and with no modifications at all or only slight

[1] For analyses of these presumptions see Bentwich, *The Declaration of London*, p. 106, and Wilson, *On International Law*, p. 409.

[2] As to the views and practices of the various maritime powers in respect to transfers of flag, see the memoranda submitted by them to the International Naval Conference at London in 1908-09, *Proceedings, House of Commons Sessional Papers, Misc. No. 4* (1909). See also my *International Law and the World War*, Vol. I, pp. 191 ff., and my article entitled *The Transfer of Merchant Vessels from Belligerent to Neutral Flags, Amer. Law Review*, May-June, 1915, especially pp. 333 ff.

[3] See as to this Sec. 315, *infra*.

[4] Later Germany, in consequence of Great Britain's refusal to observe the Declaration as a whole, altered the rules relative to transfers of flag by the substitution of a rule recognizing the validity of transfers of British vessels to the American flag only in case such vessels were employed in direct trade with Germany.

changes.[1] But the right to transfer enemy-owned vessels to neutral flags was of course affected by the abrogation in October 1915 of Article 57 which made the flag the test of the national character of vessels. Thereafter transfers of enemy owned vessels to neutrals were not recognized since the neutral flag was no longer a protection.

Were the rules embodied in Articles 55 and 56 of the Declaration merely declaratory of the customary law of nations relative to transfers of flag? The preamble of the Declaration stated that the signatory powers were in agreement that the rules contained in the Declaration "corresponded in substance with the generally recognized principles of international law."

In the case of the *Tommi* and *Rotherstand*[2] Sir Samuel Evans adverting to the relation between Articles 55-56 and British prize jurisprudence observed that "apart from the Declaration of London, and whatever alteration they may make in the law of nations, these artificial periods of time which have been agreed upon by the various nations—namely, thirty and sixty days—cannot be found in any decision of any particular Prize Court belonging to any country. They are conventional periods" . . .

But in the case of the *Edna*[3] Lord Sterndale referring to Article 56, which he said aimed to prevent only colorable transfers, stated that he did not think the article was intended "to interfere with the general principle of law as laid down by the *Baltica*[4] at all, except so far as it might throw the onus of proving the *bona fides* of the transaction upon the purchaser."

In the case of the *Dacia*[5] the claimant contended *inter alia* that Article 56 constituted a derogation from the rigor of the ancient French *règlement* of July 26, 1778, which was, apart from the Declaration of London, the existing French rule and the Prize Council admitted that Article 56 was an *atténuation*

[1] German Prize Ordinance Secs. 12-13; Austrian *Dienst règlement für die K. u. K. Kriegsmarine*, Arts. 10-11; Chinese regulations governing capture at sea, Art. 3, paragraph 4 (not identical with the rules of the Declaration); U. S. Instructions for the Navy, 1917, Secs. 57-58; French Instructions of 1912, Secs. 108-114 (reproduced in the revision of 1916); Greek regulations of 1912, Art. 1; Italian Rules Relative to the Exercise of the Right of Capture, March 25, 1917, Arts. 17-19 (with some modifications); Japanese Regulations, 1914, Arts. 22-23; Roumanian Code, Arts. 61-70 (some modifications); Russian Regulations, 1895, Art. 7, which were put into effect during the World War.

[2] II Lloyd 1; I Br. & Col. Pr. Cas.

[3] IX Lloyd 51; III Br. & Col. Pr. Cas. 419.

[4] 11 Moo. P. C. 141; 2 Eng. P. C. 628 (1857).

[5] Fauchille, *Jurispr. Franc.*, p. 328.

sensible of the old rule which did not recognize the validity of transfers made after the outbreak of hostilities.

Sec. 305. When Right to Fly National or Neutral Flag Is Acquired. When a vessel is transferred from one registry to another is the right to fly the new flag acquired at the date of sale, upon the delivery of a flag certificate, or other documents attesting the right to fly the flag, or only upon delivery of possession of the ship? In the case of an English vessel sold to a Swedish subject in June 1914 and delivered on July 25 but which did not receive its flag certificate until October 22 following, the German Prize Court held that the right to fly the Swedish flag was acquired when the ownership actually passed from the English vendor to the Swedish purchaser, that is, on July 25. This conclusion was based on the provisions of the Swedish law relative to the registration of foreign ships in the Swedish merchant marine, rather than upon the provision of the German Prize Code (art. 12).[1] But in the cases of the *Virginia* and *Indiana,*[2] two ships which had been sold by their Turkish owners to an American company but which at the time of capture had not been registered in the American merchant marine but which had on board certificates furnished by the American consul at Smyrna stating that the vessels had been the object of a *bona fide* transfer, the French Prize Commission held that they had a right to fly the American flag. But in the case of the *Bellas,*[3] originally a German ship which had been sold in June 1914 to a Portuguese subject during the course of a voyage, the Exchequer Court of Canada, sitting in prize, held that the vessel at the time of its seizure on August 5 was still a German ship because there was on board no proper bill of sale to complete the transfer before the war. The registration of the vessel under the Portuguese flag was not authorized by the proper authorities until October 7, subsequent to the seizure. In the case of the *Eugenia,*[4] an Austro-Hungarian vessel sold in May 1915 to an Italian company, from which time it flew the Italian flag, the Italian Prize Commission held that the possession of a provisional passport furnished, apparently through an error due to misrepresentation, by an Italian consul at Buenos Aires where the sale was made, did not change the enemy character of the vessel. Such a document, it declared, had no definitive character or value and such as it had was lost by the express refusal on

[1] The *Orion*, II *Entsch.* 1.
[2] Fauchille, *Jurispr. Franc.* 260.
[3] I Br. & Col. Pr. Cas. 95.
[4] Fauchille et Basdevant, *Jurispr. Ital.*, 471.

April 16, 1916, of the proper Italian authorities to "nationalize" the ship.[1]

Sec. 306. Transfers Subsequent to the Date of Capture. The French Prize Council in a series of cases held that in determining the enemy or neutral nationality of a ship the flag which it had a right to fly at the date of capture was the flag which must be considered and that all changes, sales, transfers or registrations made subsequent thereto were without effect upon the rights of captors or claimants. Therefore a ship flying and having a right to fly the French flag at the time of its capture, even though owned by an enemy, must be regarded as a French ship still although French registry was withdrawn subsequent to the date of capture;[2] and a ship flying the American flag could not be regarded as an American ship, and therefore neutral, if at the date of capture it had not been registered by the American authorities but received a certificate of registry a month and a half after the capture.[3]

II

Transfers Before the Outbreak of War

Sec. 307. Transfers to National or Allied Flag. Case of the "Tommi" and "Rotherstand." The rules of the Declaration of London, as stated above, deal only with transfers to *neutral* flags. But transfers may be equally made to the registry of an *enemy* country, actual or prospective, or to an ally of such country. Are the rules of the Declaration applicable to such transfers? A number of cases of this kind came before the Prize Courts during the World War. In the case of the *Tommi* and *Rotherstand*[4] the British Prize Court was called upon to decide the question of the validity of the transfer on the eve of the outbreak of war between Great Britain and Germany to a registered English company, composed entirely of Germans, of two vessels owned by a German company which controlled the English com-

[1] See an identical decision in the case of the *Atlanta* or *Stella Polare* (*ibid.*, 435).

[2] The *Ariadne*, the *Bon Voyage*, the *Flamanville*, the *Willkommen*, and the *Au Revoir*, Fauchille, *Jurispr. Franc.*, pp. 109, 215. But where a German ship had before the war been admitted to French registry and the "francisation" had been subsequently declared to be fraudulent, it was considered when captured during the war to be an enemy ship. The *Remorquer*, *D. K. D.*, 27 *Rev. Gén.* (1920) *Jurispr.* 94.

[3] The *Solveig*, *ibid.*, p. 126.

[4] II Lloyd 1; Br. & Col. Pr. Cas. 16.

pany. The vessels were sold by telegram on August 1 (three days before the British declaration of war against Germany), while they were still at sea bound for a port in the United Kingdom. They were flying the German flag when seized by the customs officers in an English port on August 5, 1914. The claimants contended, *inter alia*, that the sale was *bona fide* and unconditional and was made to protect the vessels against seizure by Russia, between which power and Germany war had broken out on the day of the sale; that the provision of the Merchant Shipping Act of 1894 which required a bill of sale on board applied only to the transfer of British ships; that by British law the property passed to the claimants when the contract was made; that admitting that a ship owned by aliens could not be *registered* under the British flag it could nevertheless be *owned* and used by the claimants as a hulk without being registered; that the rule under which an enemy flag gives a vessel an enemy character applied only when the flag was assumed at sea and not to a vessel which had arrived in port and was entitled to have its national character changed; and that the transfer had not been made in expectation of war with England, for until August 4 it was not expected, even in Germany, that Great Britain would be involved in the war. Sir Samuel Evans after reviewing the facts and circumstances relative to the sale stated that he did not consider it necessary to show that the claimants had in mind the probability of war between Germany and Great Britain. The transfer was made in order to defeat the right of an imminent belligerent, Russia or some other. The question, he said, was whether a transfer for that purpose could be legally made. The distinction which the claimants sought to make between the flag which a ship flies at sea and the flag which it flies in port was not well founded. The real question was, what was the flag it was entitled to fly. This was the rule of the Declaration of London, the preamble of which affirmed that it corresponded in substance with the generally recognized principles of international law. The flag which the *Tommi* and *Rotherstand* were entitled to fly was the German flag and this in itself was enough to justify their condemnation. If it were not, they were condemnable for the reason that the transfer was invalid because it was incomplete and amounted in substance to a mere arrangement by the Germany company that the vessels should be called British ships in order to protect them against capture. On this point Sir Samuel said:

"It was hardly more than this: 'We understand you over there, and you understand us over here; our companies are mutually connected. We in Germany own nine-tenths of the shares in the British company; if war breaks out, whoever the belligerent is, let these ships be called British ships.' I think that is the real substance of the transaction."

This, he said, was not a *bona fide* transfer. It was quite clear from the facts and the correspondence that the origin of the whole transaction was a desire to defeat the right of belligerents when war, which was then imminent, became an actual fact, as it did a few hours afterwards. The contention of the claimants regarding the date on which the property passed involved technicalities, he continued, which did not bind Prize Courts. "They have been treated rather as gossamer, which can be brushed aside and the Prize Court regards the essential qualities and tries to arrive at the realities of the case." Finally, there was the question as to whether a company composed entirely of aliens could own a British ship. Sir Samuel said he was not called upon to decide that question but he did not wish it to be assumed that the Prize Court could not say, looking at the realities of the thing, that even if the transfer had been completed, the two vessels ought not to be regarded as German ships. A *"Chile* order" was therefore issued for their detention.[1]

Sec. 308. Case of the "Bellas." A case involving some features analogous to that of the *Tommi* and *Rotherstand* was the *Bellas*,[2] a German barque seized in a Canadian port at the outbreak of the war and put in the custody of the Exchequer Court of Canada (in prize). The claimants alleged, *inter alia*, that the *Bellas* was not a German vessel at the time of seizure but belonged to Portuguese (neutral) subjects to whom it had been transferred by sale on July 3, a month before the outbreak of war, and while she was on the course of a voyage from a Portuguese to a Canadian port. But at the time of seizure she was flying the German flag and her papers showed that she was a German vessel. It appears that it was not until the seventh of October that the Portuguese authorities formally authorized the "nationalization" and registration of the vessel. The Court held that "under the old authorities and under the decision of our own courts the transfer must be perfected before the declaration of war by a proper bill of sale." None of the essentials of a valid transfer had been alleged here and accordingly the claim of the Portuguese owner was dismissed.

[1] For further references to these cases see Secs. 280, 287, 304, 307, *supra*.
[2] I Br. & Col. Pr. Cas. 95. See also Sec. 305, *supra*.

Sec. 309. The Same. Case of the "Colonia." In the case of the *Colonia* [1] the French Prize Council was called upon to judge the question of the validity of the sale of a German owned and registered ship, made four days before the outbreak of hostilities between France and Germany, to a German steamship company in England. The ship continued to fly the German flag until the 24th of August 1914, more than three weeks after the outbreak of war, when during the course of a voyage from a Spanish port to Bordeaux she hoisted the British flag in virtue of a provisional certificate of registration delivered to the master by the British vice consul at Vigo, Spain. She was captured by a French cruiser on October 12. As the German owner and vendor, Heckman & Co., of Algiers,[2] held the larger part of the stock in the firm of the vendee, the Heckman Steamship Co. of London, apparently no change of ownership was involved in the transaction, but merely a change of the ship's nationality. The sale was not made to a neutral, for it took place prior to the outbreak of the war when there were neither belligerents nor neutrals; nor was the transfer made after the outbreak of war, to a neutral, but to a belligerent which happened to be an enemy of the transferor and an ally of the captor. The Prize Council condemned the ship on the ground that the "sole" object of the claimant in selling it four days before the outbreak of the war and in subsequently transferring it to the British flag was to avoid the consequences which its enemy character resulting from the flag under which it was registered at the date of sale, would have entailed. The decision was based on Article 7 of the *règlement* of July 26, 1778, which declared null and void transfers from an enemy to a neutral flag after the beginning of hostilities unless it was established that the transfer had not been made to avoid the consequences of capture. It was added that in creating an absolute presumption of nullity in case the transfer is made during a voyage, Article 56 of the Declaration of London was conceived in the same spirit as that of Article 7 of the *règlement* of 1778. Finally, it was declared that no reason of law could justify the application of different rules in the case of transfers from an enemy flag to that of an allied power or even to that of France. An appeal was taken to the Council of State [3] where the appellant contended that the *Colonia* had been sold

[1] Fauchille, *Jurispr. Franc.* 50.

[2] In fact the vessel was registered under the name of Richard Heckman, director of the Heckman company. The company had been placed under sequestration by the French authorities.

[3] *Ibid.*, p. 485.

by a German company of Cologne to Heckman & Co. of Algiers in October 1913 and it was only as a guarantee of the payment of the price that the ship had been retained under German registry with Cologne as its *port d'attache;* that although Heckman owned 800 of the 1,000 shares in the English firm he had in September 1914 sold 600 of them to his son-in-law, an American citizen (neutral) and was therefore the principal party interested in the ship; that in law the transfer to the British flag actually resulted from the sale to the English house, which took place before the outbreak of war, and that it was only because of indispensable formalities that the right to fly the British flag was not acquired earlier and consequently Article 55 and not Article 56 of the Declaration of London should be applied; that even admitting that Article 56 applied, the presumption of nullity which it created when the transfer took place during a voyage did not exist here since the *Colonia* was not *en voyage* but was calling at the port of Vigo when the transfer to the British flag actually took place. These contentions, however, were rejected by the Council of State, some of them because the evidence produced did not establish their verity; others because, in the opinion of the council, they were not warranted in law.

Sec. 310. Under Article 57, While in Force, Flag Was Conclusive in Case of Transfers Made Before Outbreak of War. The case of the *Virginia* involved the validity of the transfer of a Turkish vessel which had been sold to an American steamship company in March 1912 and which although it was not registered as an American ship had on board a certificate delivered by the American consul at Smyrna attesting that the vessel had been legally transferred to an American company and had a right to fly the American flag. The ship was captured by a French cruiser on July 7, 1915, but the capture was held to be illegal on the ground that the transfer, made before the outbreak of the war, was regular and Article 57 of the Declaration of London being in force at the time of the capture the Prize Council would not go behind the flag to inquire into the matter of alleged enemy interests in the ship.[1]

Sec. 311. Uncompleted Transfers. What Constitutes Good Faith? The Chinese Prize Court was called upon to determine the question of the validity of the transfers of several German and Austro-Hungarian vessels to Chinese purchasers,

[1] Fauchille, *Jurispr. Franc.*, 260. See also *supra*, Sec. 279.

made before the outbreak of war between China on the one hand and Germany and Austria-Hungary on the other. The Chinese regulations governing capture at sea, promulgated October 30, 1917, enumerate as "enemy ships" those "which have been transferred to persons domiciled in the Republic, or in a neutral State, before the war but in anticipation of its outbreak; or during the war, unless the transfer has been completed and is shown to have been made in good faith." [1]

The case of the *Fortuna* [2] involved the validity of the sale of a German merchant vessel lying in the port of Shanghai, to a Chinese subject on March 12, 1917, some seven months before the outbreak of war (August 14) but only two days before she was taken into custody by the Chinese government.[3] The claimant admitted that he had paid only $10,000 of the $38,000 stipulated in the contract of sale but contended that the action of the Chinese government in taking custody of the ship some months before the outbreak of war between Germany and China prevented him from completing the payment prior to the declaration of war. It was not therefore right, he argued, to condemn the ship on the ground that the contract of sale had not been fully performed. In any case, it ought to be held that the contract was performed by the delivery of the vessel to the purchaser. It was contended furthermore that the German vendor had intended to sell the ship long before there was any apprehension of the outbreak of war (as early as 1915) and that negotiations for the sale had been carried on with various persons until a purchaser was finally found in March 1917. Consequently it could not be said that the motive was to withdraw the ship from all risk of capture.

The High Prize Court, however, affirming the judgment of the lower court, held the transfer to be invalid on the ground that the sale was not a *bona fide,* fully completed and unconditional transaction, the fact of which was strengthened by a clause in the contract of sale that the ship should remain the property of the vendor until the full purchase price had been paid; that the amount had not been paid at the time of capture; that delivery of possession, which is essential to a valid transfer, had not been made and that the sale had been made in contemplation of war. As to the contention of the appellant that but for the taking of the ship into custody by the Chinese govern-

[1] *Judgments of the High Prize Court of the Republic of China,* 136.
[2] *Ibid.,* 68.
[3] The date on which diplomatic relations were broken off.

ment the sale price would have been paid and the transaction completed before the outbreak of the war, the Court said:

"But the taking of the ship into custody was the exercise of a right of self-protection well recognized in international law and, as it was apprehended that the ship would endanger the security of the port, it was properly taken into custody; therefore, assuming that the completion of the sale has been prevented by its being taken into custody as alleged, the fault only lies with the appellant."

In the cases of the *Silesia*,[1] *China*,[2] and *Bohemia*[3] the sales of three Austrian ships lying in a port of China, to a Chinese purchaser on the 13th of August 1917, the day before the outbreak of war between China and Austria-Hungary, were held to be invalid transfers. The ships were seized on the 14th of August while they were still flying the Austro-Hungarian flag, before the full purchase price had been paid and before delivery of possession had been effected. The appellant contended that the transfer was completed by the signing of the contract of sale prior to the outbreak of war, that he had purchased the ships for the sole purpose of enlarging his business, that he had been endeavoring for some months to purchase the ships, that diplomatic relations between China and Austria-Hungary, unlike those between China and Germany, had not been broken off and consequently there was no expectation of war between the two countries and therefore no motive of defeating the belligerent right of capture. The High Prize Court, however, held that the transfers not having been completed before the outbreak of the war were invalid. Even admitting that they were genuine transfers the circumstances of the transfers, it was added, were such as to create the presumption that they were made in contemplation of war and the presumption had not been rebutted by proof.

Sec. 312. The Same. Italian Cases. In the cases of the *Atlanta* or *Stella Polare* and the *Eugenia* or *Lombarda*[4] the Italian Prize Commission was called upon to decide upon the validity of the sale of two Austro-Hungarian ships made at Buenos Aires in May 1915 (apparently a few days prior to the outbreak of war between Italy and Austria) by an Austrian company having its seat at Trieste, to an Italian company of Venice. The ships flew the Italian flag and carried provisional passports furnished by the Italian consul at Buenos Aires on

[1] *Ibid.*, 88. [2] *Ibid.*, 97. [3] *Ibid.*, 110.
[4] Fauchille et Basdevant, *Jurispr. Ital.*, 435, 471.

May 24, 1915, when war already existed between Italy and Austria-Hungary. They sailed from Buenos Aires in June after having been requisitioned by the Italian consul. In the meantime a letter was intercepted which had been addressed by one Oscar Cosulich, head of the Austrian firm which had made the sale, to an American citizen named Phelps notifying the latter of the sale to the Italian company and assuring him that the shares in the latter company belonged entirely to himself (Cosulich); that the sale price of the two vessels had not been paid; and that under the terms of the contract of sale the vendee company was obliged to remit to the vendor the profits from the operation of the ships. It being evident that the sale was not a *bona fide* and complete transaction, the Italian government refused to register the ships under the Italian flag but put them under sequestration. The Prize Commission on the basis of the letter to Phelps and other correspondence, concluded that the Austrian house which had sold the ships to the Italian house continued to consider the vessels as theirs and even continued to occupy themselves with their management after the outbreak of war between Austria and Italy; that the purchase price had never been paid and therefore the transaction was incomplete; that a transfer of flag made after the outbreak of war creates a presumption of fraud, especially when the sale of the ship was in reality fictitious and simulated; and that a provisional passport delivered to such a vessel by a consul in consequence of error due to misrepresentation by the interested party does not suffice to give national character to an originally enemy ship. In consequence of these findings the ships were condemned as good prize. The contention of the claimant that they were not liable to capture, for the reason that at the moment when the sale was made they were at Buenos Aires, that is, in neutral territorial waters, was rejected. The right of capture, said the Commission, may not be exercised in neutral waters but the momentary *séjour* of a ship in such waters does not change the character of an enemy ship. It merely constitutes an accidental circumstance whose effects cease with the circumstance. At the moment when the right of capture accrued the ships had an enemy character and all the conditions existed under which that right might be exercised.[1] But in the case of the *Gisela*[2] the Italian Prize Commission held that an Austro-Hungarian ship

[1] For further references to these cases see Secs. 165, 289, 305, *supra*.
[2] *Ibid.*, 242.

belonging to an Italian subject who had purchased it through an Austrian intermediary from its Austrian owners on March 29, 1915 (nearly two months before the outbreak of war) but which the Italian authorities had refused to transfer to the Italian flag because the Austrian government would not consent to the sale of Austrian vessels to foreigners, could not be regarded as an enemy ship but as the property of an Italian subject, notwithstanding that the transfer to Italian registry had never been completed.

III

Transfers After the Outbreak of War

Sec. 313. The Case of the "Dacia." French Interpretation of Article 56. The case of transfer which attracted the widest popular attention during the World War was that of the *Dacia* decided by the French Prize Council in August 1915.[1] The *Dacia* was one of numerous German merchant vessels belonging to the Hamburg-American Line which had taken refuge in ports of the United States after the outbreak of the war in Europe. While lying in a Texas port during the period of American neutrality she was purchased by an American citizen named Breitung and transferred to American registry. She was captured by a French cruiser on February 27, 1915, during the course of a voyage from Port Arthur, Texas, to Rotterdam while laden with a cargo destined for Bremen, and was put into the custody of the French Prize Council. All the requirements of American law governing the transfers of foreign vessels to American registry had been fully complied with and she was carrying a bill of sale and was flying the American flag when captured. The cargo had been insured by the American government in pursuance of the emergency war risk insurance act of Congress but the government entertaining some doubt as to whether the Allied Powers would recognize the validity of the transfer from a belligerent to a neutral flag declined to insure the vessel. Nevertheless, the American government requested an assurance from the British government that the *Dacia* should be allowed to carry her cargo to Rotterdam unmolested, but the latter government being unwilling to admit the validity of the transfer or to waive

[1] Fauchille, *Jurispr. Franc.*, 94. There is an English translation of the decision in 10 *Amer. Jour. of Int. Law, Docs.*, pp. 1015 ff.

its right of capture, declined to give the assurance and announced that the vessel would, if captured, be put in the custody of the Prize Court in order that the validity of the transfer might be judicially determined. The French government was reported to have gone still further and filed with the American Department of State a notification that it would decline to recognize the transfer to American registry of any German vessels lying in American ports and purchased by American citizens and transferred to American registry. The case presented directly the question whether belligerent merchant vessels lying in neutral ports where they had taken asylum to avoid capture could be purchased by neutral persons, transferred to neutral registry during the war and employed in commerce with an enemy country, that is, an enemy of the State capturing it.

The claimant in this case demanded the restitution of the vessel and the payment of 300,000 francs damages on account of her detention. He invoked Article 56 of the Declaration of London and argued that the transfer had not been made to evade the consequences of capture to which the vessel was exposed while under an enemy flag, that the purchase and transfer to American registry was a *bona fide* commercial transaction; that the ship was bought by him in the normal course of his business; that his sole object was to acquire at a reasonable price a ship which he needed in his business; that the ship was lying idle in a neutral port and since she was not while there exposed to the risk of capture it could not be said that the purpose or effect of the transfer to a neutral flag was to withdraw her from a risk to which she was not in fact exposed; that the sale was a fully perfected and unconditional transaction with no reservation of interest whatever on the part of the vendor, and reliance was had upon a statement of the solicitor of the American Department of State that it was the *bona fides* of the transaction which constituted the essence of the validity of the transfer rather than the motive either of the vendor or the vendee. The Declaration of London never having been ratified by the French government the Prize Council might have refused to apply Article 56 and have condemned the *Dacia* on the basis of the ancient French rule which treated as illegal all transfers from belligerent to neutral flags made subsequent to the outbreak of war.[1] But

[1] The ancient French rule is explained by Dupuis, *Le Droit de la Guerre Maritime*, Secs. 96 and 97; by De Boeck, *De la Propriété Ennemie Privée*, pp. 172-176, and by Pistoye et Du Verdy, *Prises Maritimes*, Vol. 2, p. 3. It may be observed, however, that French practice since the middle of the 19th

the French government had by a decree of November 6, 1914, put the Declaration into effect with certain modifications none of which touched Article 56 and this decree was still in effect at the time the *Dacia* was captured. In these circumstances it was mutually agreed by the parties that Article 56 should be the "sole law applicable in the case." As the article recognized the validity of *bona fide* transfers made after the outbreak of the war, whereas the ancient French rule apparently did not, the decision to apply Article 56 greatly strengthened the case of the claimant. Nevertheless, the French Prize Council at the outset took the position that since the Declaration of London had never been ratified by the French government it had "purely and simply the value of an internal disposition the interpretation of which belonged to the Council." Whether, therefore, the transfer was valid depended upon the interpretation which the Council should place upon the meaning of Article 56. By the terms of the Article the transfer in this case was presumed to be void but since it was not made during a voyage or in a blockaded port and since the requirements of American law relative to transfers had been fully complied with and there had been no reservation of interest on the part of the vendor—all of which was readily admitted—the presumption of invalidity was rebuttable, the onus being on the claimant to prove to the satisfaction of the Prize Council that the transfer had not been made to withdraw the ship from the consequences to which as an enemy ship she was exposed.

This burden of proof was not, in the opinion of the Prize Council, satisfactorily discharged and the transfer was declared to have been invalid. "Considering," said the Council, "that neither the nationality nor the commercial position of Breitung nor his pretended speculations, no more than the object that he claimed to have had in view in acquiring at a satisfactory price a thing of which he had need, constituted sufficient proof that the transfer of the *Dacia* to the American flag was not made to avoid the risk of capture; that none of his allegations related to the motives which the Hamburg-American Line had in mind

century had not been strictly in accord with the ancient rule. Apparently the only case of transfer which came before the Prize Council during the 19th century was that of *Le Haabet* v. *l'Heureux* (1805) and there the ship was condemned because the sale was not *bona fide* and complete. See Pistoye et Du Verdy, *op. cit.*, Vol. I, p. 239. I have discussed the rules and practice of different States in regard to transfers of flag prior to the World War, in an article entitled "The Transfer of Merchant Vessels from Belligerent to Neutral Flags," published in the *American Law Review*, of May-June, 1915, pp. 321 ff.

in selling the *Dacia;* that in this regard, the simple affirmation of its director, according to which he wished to sell the ship because she was old, was insufficient proof, when it was established, on the other hand, that she was lying idle because of the risk of capture and that the transfer had been the condition of her affreightment and of the sale." Adverting to the statement of the solicitor of the American Department of State that Aricle 56 had in mind only the prohibition of colorable or fictitious transfers and not those made in good faith and that the Article did not look to the ulterior motives of the parties [1] the Prize Council admitted that on this point there was a divergence of opinion at the London Naval Conference but asserted that the British and German memoranda made it clear that they understood by "good faith" the absence, among the motives of the transfer, of an intention to withdraw the ship from the risk of capture; that this understanding appeared from the General Report presented to the Conference; and that it represented the view incorporated in the German [2] and Austrian[3] prize codes, both of which affirm that transfers shall be regarded as illegal unless they would have taken place even if war had not broken out, and in the British and French decrees putting the Declaration of London into effect after the outbreak of the war and this was the view of the Italian Prize Commission during the Turco-Italian war.[4] In thus holding that Article 56 created a new test of good faith, based on the motives of either the vendor or the vendee, or both combined, namely that the transaction must not only be genuine in the legal formal sense but it must not have been made with the motive of withdrawing the ship from the consequences of capture, the interpretation of the Prize Council was undoubtedly in accordance with the plain meaning of the Article and with the understanding of the conference which formulated it.[5]

[1] This opinion of the solicitor was referred to by the Prize Council as having "been prepared hastily, without time or possibility of correction and which was the object of strong attack in the Senate of the United States" (notably on Jan. 25, 1915) and that it "must be regarded as a plea in favor of certain interests and not as the claimant contends, an official commentary on the Declaration of London."

[2] Article 12. [3] *Dienst Règlement*, Art. 3.

[4] Cases of the *Vasilios* and *Aghios Georghios*, 20 *Rev. Gén.* 656.

[5] This would seem to be clear from the General Report, *Procs. Int. Naval Conf., House of Coms. Ses. Papers, Misc.*, No. 4 (1909), Annex No. 141, p. 327.

It may be observed here that while the Prize Council in this case relied upon the General Report in the Declaration of London, to ascertain the meaning of Article 56, in the case of the *Federico*, it refused to take into consideration the Report interpreting Article 47. See Sec. 115, *supra*.

Although the bill of sale found on board was not signed by the vendee nor by any person acting for him, the Prize Council was willing to assume that the transfer was regularly made, but even admitting this, it was established, said the Council, that the *Dacia* had, not only after the transfer "continued as in the past her commerce with the enemy" but that at the very moment of capture she was engaged in the same voyage for which she had been affreighted when she was still under the German flag and in view of which she had been transferred to a neutral flag.[1] Such a transfer, it added, "having had for its object to permit enemy trade and to withdraw the ship from capture cannot be opposable to belligerents." The action of the purchaser in employing the *Dacia* in enemy trade, after its transfer to a neutral flag undoubtedly influenced materially the view of the Prize Council and there is reason to believe that if he had used the ship in trade, say with the Orient or South America, the transfer might have been upheld as valid. Upon appeal the judgment of the Prize Council was affirmed by the Council of State.[2] The appellant argued before the Council of State that in the determination of what constitutes good faith it is the motive of the purchaser or transferee only which is decisive and not that of the transferor. It was impossible in this case, he argued, for the transferee to prove what were the real intentions of the Hamburg-American Line, the transferor. Nevertheless, he asserted, the motive could have been none other than the desire to realize upon the sale of an old vessel which was lying idle in a neutral port and entailing expense rather than earning profit for its owners. The Council of State admitted that Article 56 constituted an *atténuation sensible* of the *règlement* of 1778 but asserted that it was still incumbent upon the claimant to prove that the transfer had not been made to withdraw the ship from the risk of capture and this proof was not met by the simple allegation that the contracting parties "had a serious interest in the transmission of the ownership of the ship"; that according to the interpretation of the report of the Naval Conference and the proceedings thereof it was necessary to prove that *the sale would have taken place even if there had*

[1] The Prize Council here did what it apparently never did in any other case, in citing several decisions of foreign Prize Courts and text writers in support of its conclusions. The cases and authorities cited were the *Jemmy*, 4 Rob. 31, 1801; the *Benito Estenger* (176 U. S. 568); and Story, *Notes on the Principles and Practice of Prize Courts* (Pratt's ed., p. 63).

[2] Fauchille, *Jurispr. Franc.* 326.

been no risk of capture resulting from the existence of war. Moreover, it was the act of sale considered as a manifestation of the intention of both parties by which, according to Article 56, the motives must be determined; and that the claimant had produced no proof to show that it was not the principal motive of the Hamburg-American Line in selling the ship to withdraw her from the risk of capture; that, on the contrary, the opposite presumption resulted, first from the fact that the contract of affreightment with the claimant was with some modifications only the confirmation of a contract of the same nature, concluded before the sale, for the transportation of the same or a similar cargo on the *Dacia* to the same port and on account of the same shippers. In brief, the interpretation which the Council of State placed upon Article 56 was that it required the transferee to prove not only innocence of motive on his own part but also a similar motive on the part of the transferor; and to establish also that the sale would have taken place just the same if war had not broken out. Manifestly the obligation of a transferee to discharge so heavy a burden of proof would in most cases be quite impossible.

Sec. 314. Observations on the Decision in the "Dacia" Case. This interpretation of the meaning of Article 56 appears to be contrary to that adopted by the Judicial Committee of the Privy Council in the case of the *Edna*,[1] where it was held that Article 56 was intended to prohibit only "colorable" or "fictitious" transfers and that if the transferee acts in good faith, that is, without motive of withdrawing the ship from the risk of capture, it is immaterial what the motive of the transferor may be. As Lord Sumner justly remarked in that case if the claimant is bound to prove that the transferor made the transfer for other purposes than to evade capture and condemnation, if pressed to its logical results, the consequence would be that the validity of few transfers could be established, for in most cases the vendee does not know and cannot ascertain what the real motives are which animate the vendor and if he did or could it would be difficult to establish innocence by proof, in case the motives were innocent.

What the real or dominant motive of the vendors of the *Dacia* was is not known and it was never established in the proceedings before the Prize Council or the Council of State. In any case it is hard to see how it could have been the desire to with-

[1] See Sec. 315, *infra*.

draw the vessel from the risk of capture for when she was sold she was exposed to no risk whatever. The motive may have been and probably was to realize immediately upon a piece of property which was idle and unprofitable. According to the French interpretation of Article 56 its effect is to render practically impossible the valid transfer of vessels from enemy to neutral flags after the outbreak of war. It is certain that this was not the intention of the International Naval Conference which formulated the article.[1] Article 56 creates an absolute presumption of invalidity only against transfers (if unconditional and formally legal) that are made *in transitu* and in blockaded ports and thus recognizes inferentially the possibility of legal transfers being made in neutral ports. But if, according to the French interpretation of the Article such transfers as that of the *Dacia*, made in neutral ports where they are safe from capture, must be regarded as having been made for the purpose of withdrawing the ships from the risk of capture and condemnation, it is not easy to conceive how any transfers could be sustained as legal. It is not unlikely that had the case come before the British Prize Court a different decision would have been reached.[2] It is true, as stated above, that the French Prize Council applied Article 56 instead of the more rigorous ancient rule of French prize law but the interpretation which the council gave the article made it little less rigorous than the old rule.

Sec. 315. Case of the "Edna." British Interpretation of Article 56. What Constitutes Good Faith? An important English case, important by reason of the interpretation of the elements which constitute a *bona fide* transfer, was that of the *Edna* decided in the first instance by the British Prize Court in April 1919[3] and on appeal by the Judicial Committee of the Privy Council in March 1921.[4] The facts involved in the trans-

[1] Lord Crowe, one of the English delegates, stated at the time that "it is certain that during every war Prize Courts will be called upon to pronounce judgments upon a number of sales made in good faith, since there will always be a regular traffic in ships as in other objects. *Procs. Int. Naval Conf., House of Coms. Ses. Papers, Misc.*, No. 5 (1909), p. 167.

Westlake seems to have thought that the purpose of Article 56 was to prohibit transfers *in transitu* and not those made in neutral ports (*Int. Law*, Pt. II, p. 149). This seems to have been also the view of the Institute of International Law as expressed in its *Règlement international des Prises Maritimes*, 9 *Ann.*, Sec. 26.

[2] There is, in fact, reason to believe that the capture of the *Dancia* by a French rather than a British cruiser was the result of prearrangement between the admiralties of the two countries. See the remarks of Ambassador Page in Hendrick, *The Life and Letters of Walter Hines Page*, Vol. I, pp. 392-397.

[3] IX Lloyd 51; III Br. & Col. Pr. Cas. 407. [4] *Ibid.*, 70; *ibid.*, 927.

action are numerous and complicated since there were several changes of the ship's flag, in the course of a year and a half. Briefly, they are as follows. The ship, originally named the *Jason,* was before March 1914 a Norwegian vessel. She was sold in August 1914 to a Mexican company and was given Mexican registry under the name of the *Mazatlan.* The owner, however, was a German named Jebsen who had organized the Mexican company which purchased her and in fact she was sailing under the German flag in order to avoid being requisitioned by one or the other of the warring parties in Mexico. Later, however, she appears to have been requisitioned by the Mexican government and used as a military transport for about a year. Upon being released she was sold in October 1915 to the claimants, an American firm in San Francisco, and was given American registry under the name of the *Edna* in January 1916. The purchase price appears to have been paid over to the vendors and a bill of sale was duly executed and recorded. The legal formalities therefore appear to have been fully complied with. In April 1916 the *Edna* was captured by a British warship and prize proceedings were instituted against her.

At the hearing by the Prize Court the claimants relied on Article 57 of the Declaration of London which was in force at the date of the transfer. The Crown contended that the vessel had served as a tender to the German warship *Leipzig* and must therefore be treated as an enemy auxiliary ship. Moreover, it was argued, the transfer to neutral registry was void under Article 56 of the Declaration of London which forbids transfers for the purpose of avoiding the consequences of capture. Lord Sterndale, then President of the Prize Court, held that the action of the vessel in supplying coal to a German warship as an incident of a voyage did not make her an auxiliary of the German fleet and as such render her liable to condemnation in the event of seizure taking place on a subsequent and innocent voyage after she had been transferred to neutral registry. Regarding the contention of the Crown that the transfer was not valid under the Declaration of London for the reason that the purpose of the transferor was to withdraw the ship from the risk of capture, Lord Sterndale stated that the contention as put forward by the Crown amounted virtually to an argument that since an enemy vessel is always exposed to the consequences of capture she can never therefore be validly transferred to a neutral flag because the transfer will always be made to evade the

consequences of her being an enemy vessel. If, he said, the sale is made *bona fide* because the purchaser wishes to get the ship for his own purposes, the transfer cannot be said to have been made in order to evade the consequences referred to. It, of course, puts an end to the consequences to which she is exposed as an enemy vessel, but it cannot be said that the transfer was made to avoid those consequences. What Article 56 was really intended to forbid, he thought, was what might be called "colorable" transfers, such as those under which the vendor reserves the right to repurchase or recover the vessel. "I do not think," he added, "that this Article was intended to interfere with the general principle laid down by the *Baltica* at all, except so far as it might throw the onus of proving the *bona fides* of the transaction upon the purchaser." Here *bona fides* was shown, and he thought that this transaction was a perfectly valid one.

During the proceedings before the Privy Council the Crown put forward the contention that a transfer could not be sustained as valid unless the claimants proved that *not only they but also the transferors* had acted in good faith, that is, without any purpose of defeating the belligerent rights of the captors. Replying to this contention Lord Sumner said:

"It is said that such a transaction must be tested by the state of mind in which it is conceived and carried through, and that in the nature of things the relevant state of mind is that of the transferor. The transferee's mind may be honest, and yet the impropriety of the transferor's motives may defeat the whole transaction. For this authority is sought in Article 56 of the Declaration of London as being a considered and correct formulation of the law of nations on the point. Articles 55 and 56 deal with transfers of enemy ships before and after the outbreak of war respectively. In the first case, the transfer of an enemy ship is declared to be valid, unless it is proved to have been made in order to evade the consequences to which, as an enemy ship, the outbreak of war would expose her. In the second, the transfer is declared to be void, unless it is proved that it was not made in order to evade these consequences. Transfers are effected by the combined action of two parties, the seller and the buyer, and the word 'evade' suggests something more than 'escape,' for the latter is a result, while the former is a means by which a result is brought about. The contention, however, is that the transfer was made by the transferor, the person who makes it, otherwise than for the purpose of evading capture and condemnation. If this construction is the true one, the article very considerably alters the law as laid down in decisions which bind, or have been accepted by, this Board, and the alteration is an enhancement and not a waiver of belligerent rights. If pressed to its logical results, it would in practice invalidate most transfers to neutrals, for how could a neutral command the evidence of his transferor, who alone could make a clean breast of his motives and objects in entering into the transactions? If

the enemy's testimony were not forthcoming, how could it ever be inferred from circumstances alone, that, among the many objects with which men sell their chattels, the object of escaping the harassing peril of capture may not have been one? If, on the other hand, that evidence was given, what is the state of facts in which any court would believe that the vendor was wholly innocent of such a desire? It is better to adhere to the settled rules laid down in the *Ariel* and the *Baltica*. Of course, a vendor may be shown to be so much interested in getting rid at all hazards of the appearance of ownership as to lead to the conclusion that he really did what he was most interested in doing, and shed the apparent title while retaining the property. A court would then hold that there was no real sale, not that the sale was real and effectual, but that the vendor's reprehensible state of mind caused the buyer to lose the ship for which he paid his money. The article is in all probability an endeavor to find an acceptable compromise between English and Continental views on the point, and, if so, is not an authority to be followed now.

"The claimants, on the other hand, contend that it is the state of mind of the buyer which alone can matter. If he honestly intends to buy, and does buy, the seller's reasons for selling are immaterial. He has his reasons or he would not sell, but what they are is of no consequence. This again will not do. To say that no regard need be had to the mind of the seller goes too far. No doubt, when once the question, whether the sale is a real sale, is answered in the affirmative, the prior motives and objects of both parties become merely antecedent and preliminary matter; but in ascertaining how that question is to be answered, great light is thrown on the transaction by considering the situation of both parties, so as to test what they purported to do by what they must really have intended. Plainly, however, the mere fact that to uphold the sale might prevent the Crown from obtaining a condemnation cannot affect the matter, for that would mean that a judgment upon a question of fact should be given one way or another, according as the upshot affected the interest of the British Crown.

"In the present case it is now clear that what the claimants meant to do was what they purported to do—namely, to buy the ship without reservation—and what they did was to perform their part of the contract so made by paying the price and taking delivery. Beyond the fact that they changed her name, a circumstance immaterial as things stand, although had other facts been proved against them it might have had some importance, nothing has been done on their side to raise any doubt against them."

The important principle here laid down is that an enemy-owned ship sailing under a neutral flag may be validly transferred to neutral owners after the outbreak of war if the transferee or purchaser is acting in good faith, whatever may be the motive of the transferor and that Article 56 of the Declaration of London was intended to prohibit only colorable or fictitious transfers devised by both parties in combination.

As in the Prize Court, the claimants argued before the

Judicial Committee that since the vessel while flying an enemy flag served as an auxiliary ship to a German war vessel, it stood in such relation to the German government that its transfer during the war to neutral registry could not be recognized by the Prize Court, even if it were competent to consider such a transfer. In short, the right of transfer belonged only to merchant vessels and not to auxiliary war ships. This was well settled by the cases of the *Minerva,* the *Etta,* and the *Georgia.* But the Judicial Committee held, affirming the judgment of the Prize Court, that the conduct of an enemy merchant vessel in rendering aid to an enemy war ship while on a voyage many months before its transfer to a neutral flag was not sufficient to warrant its condemnation as an auxiliary vessel.[1]

Sec. 316. Transfer of Enemy Owned Ship to French Flag After Outbreak of War. In the case of the *Victoire ex Virginia*[2] the French Prize Council condemned a ship which in July 1917 had been sold by a neutral company to a French citizen and which had acquired a provisional right to fly the French flag but which in October following had been withdrawn for the reason that it was discovered to be an enemy owned vessel, wholly or in preponderating part. The question before the Prize Council was not the legality or illegality of a transfer from a belligerent to a neutral flag but of a transfer from a neutral to a French subject. The claimants argued, *inter alia,* that the rigorous rules governing transfers in the former case were not applicable in the latter and that even if the transfer were held to be invalid, the ship should be released for the reason that she was not an enemy vessel. As to the latter contention the Prize Council held that the Turkish vendor who had sold the ship originally to the American company had retained large interests in the ship and therefore she was an enemy vessel when she received a provisional "francisation" with a right to fly the French flag. As to the validity of the transfer from American to French registry the Prize Council, no longer bound by Article 56 of the Declaration of London[3] which had been abrogated prior to the capture, and relying upon the ancient rule of the

[1] See further as to this case, Secs. 434, 447, *infra.*

[2] This was the same ship which under the name of the *Virginia* had been captured by the French in July, 1915, and released by the Prize Court on the ground that at the time it was flying and had a right to fly the American flag.

[3] It will be recalled that in the case of the *Dancia* the Prize Council agreed to apply Article 56, the Declaration then being in effect by virtue of a government decree.

règlement of July 26, 1778, held that the transfer was invalid. The ship having been transferred after the outbreak of war to a Frenchman by a company which was incorporated in a neutral country but in which enemy interests were preponderant, the Prize Council said it must be presumed (and the presumption was irrebuttable under the old French rule) that the purpose of the transfer was to withdraw the ship from the risk of capture to which as an enemy ship she was exposed. Having already decided in the case of the *Colonia* that the rule governing transfers from belligerent to neutral flags applied equally to transfers to national flags the plea of the claimant in this regard was rejected.

Sec. 317. Fictitious Transfers. In the case of the *Kypros ex Maine*[1] the French Prize Council held that a sale in July 1917 by the above mentioned American steamship company of a vessel to a person of Greek nationality was a purely fictitious transaction, the ownership of the vessel remaining in fact in the company, the stock of which as was decided in the case of the *Victoire ex Virginia*, belonged mainly to a Turkish family. The contention of the claimants that since the actual owners were Christian Syrians, *protégés* of France, the ship ought to be released was rejected as inadmissible.[2]

Sec. 318. German Interpretation of Article 56. The "Pass of Balmaha." In the case of the *Pass of Balmaha*[3] the question of the validity of the transfer of a vessel from the British to the American flag made in January 1915 was presented to the German Prize Court at Hamburg. Applying the rule of Article 12a of the German prize ordinance that a vessel transferred from an enemy to a neutral flag after the outbreak of war shall be regarded as an enemy vessel still, unless the commander of the capturing ship is convinced that the transfer would have taken place even if war had not broken out, the Prize Court pronounced the transfer to be invalid. The purport of the Article of the

[1] 26 *Rev. Gén.* (1921), *Jurispr.* 18.

[2] It may be remarked in this connection that the French Prize Council always inspired by the spirit of ancient French Prize Law (Art. 6 of the *règlement* of July 26, 1778) declined to recognize the validity of the naturalization of owners of ships, effected subsequent to or less than three months before, the outbreak of war when it involved the abandonment of enemy nationality. See the case of the *Preconnissos*, Fauchille, *Jurispr. Franc.* 335. Likewise it refused to take in account the change of nationality undergone by an enemy shipowner, in consequence of a plebiscite held in accordance with a provision of the treaty of peace at the close of the war. See the case of the *Mercur*, a ship belonging to a German subject in Schleswig, who prior to the condemnation of the vessel had become a Danish subject in virtue of a plebiscite, 27 *Rev. Gén.* (1920) *Jurispr.* 69.

[3] Cited by Verzijl, *op. cit.*, p. 415. Not found in the *Entscheidungen.*

German prize code, the Court asserted, was essentially the same as that of Article 56 of the Declaration of London. The German prize code lays down that the evidence of the right of a vessel to fly the flag which it is flying at the time of capture is found in the papers which it must carry. These papers were not on board the *Pass of Balmaha* and the claimants producing no evidence that the transfer would have been made in the event war had not broken out, the ship was condemned. Thus the Court applied the rigorous test adopted in the case of the *Dacia.*

Sec. 319. The Same (Continued). Case of the "Cubano." In the case of the *Cubano* [1] the Supreme Prize Court of Germany discussed in detail the meaning of Article 12 of the German prize ordinance and its relation to Article 56 of the Declaration of London. The *Cubano,* originally an English ship, the *Strathmore,* was at the time of her seizure and destruction by a German submarine on June 2, 1915, flying the Norwegian flag to which she had been transferred subsequent to the outbreak of war between Great Britain and Germany. She had on board no documents relating to the sale and transfer although there was found a certificate of registration under the Norwegian flag, dated May 28, 1915. She carried a mixed cargo consisting of both contraband and non-contraband goods. The Supreme Court confirmed the judgment of condemnation pronounced by the lower court, although it did not approve all the reasons on which the judgment was based. The Court again affirmed that Article 12a of the German prize ordinance meant nothing more than Article 56 of the Declaration of London, namely, that a transfer made after the outbreak of war is invalid unless it is proved that it was not made in order to evade the consequences to which an enemy vessel, as such, is exposed, except that under Article 12a of the prize ordinance the decision of the Prize Court must depend solely on the question whether the commander had sufficient proof to justify him in concluding that the transfer would not have been made but for the existence of war. But it belonged to the claimant to produce evidence to show the contrary, that is, to rebut the presumption of invalidity. In this case he failed to discharge this burden to the satisfaction of the court.

After reviewing the proposals made at the London Naval Conference and the solution finally adopted the Prize Court concluded:

[1] I *Entsch.* 203, Fauchille et De Visscher. *Jurispr. All.,* 155.

"It results from all this that the distinction of which it is a question here does not reside in the question whether, if the transfer of a ship to a neutral flag, in case the sale has been real, definitive and complete in all respects, or not, but in the question whether if the sale has been induced by the war and the risk to which the ship would be exposed, as an enemy ship, or whether it would have taken place independently of this event. The presumption consists in the establishment of this original relation. And that responds to the nature of the affair. The transfer of an enemy ship to a neutral flag always has as a consequence the removal of the danger to which it is exposed. Not only the interested parties know it, but in a general fashion, it must be admitted that if they decide to transfer the property after the outbreak of war, they have had the will and intention of removing the risk to which they are exposed. As a general rule it will not be a question simply of the desire to procure means of transportation because this need may be met by charter contracts. This, however, is not what is sought, but rather the protection of a neutral flag. It is sufficient that this motive has been concomitant. . . . It cannot be denied that this was a serious and definitive sale—a sale by which the property and control of the ship passed to the purchaser. But this is not conclusive. In virtue of the legal presumption, the claimants are bound to produce proof that the sale was not made to assure for the ship the protection of a neutral flag. And in this relation nothing has been produced. The fact that before the war, the original owner [English] had proposed the sale proves nothing. The very different circumstances which existed then do not warrant the drawing of conclusions *à posteriori* about what happened under totally different conditions created by the war."

Under this rigorous interpretation the validity of few or no transfers from belligerent to neutral flags, made after the outbreak of war could be established. It is hardly probable that either party to such a transaction would ever be able to establish to the satisfaction of a Prize Court that it would have taken place just the same had war never broken out. This interpretation, like that of the French Prize Council in the case of the *Dacia,* very nearly reduced Article 56 of the Declaration of London to a nullity.[1]

Sec. 320. The Same (Continued). Case of the "De Brussels 31." Uncompleted Transfer. In the case of the *De Brussels 31* [2] the German Supreme Prize Court followed the interpretation adopted in the case of the *Cubano* and pronounced invalid the sale of a dredge boat which had been made on July 12, 1915, by its Belgian owner to a Dutch purchaser. By the terms of the contract of sale the price of the boat was to be fixed by three experts when it should arrive in a Dutch port. At the time of capture this had not been done although the ven-

[1] Compare also the case of the *Orion,* Sec. 469, *infra.*
[2] I *Entsch.* 310; Fauchille and De Visscher, *Jurispr. All.* 236.

dor declared that he had received 20,000 francs in part payment of the price to be ultimately fixed. The Prize Court held that in consequence, the transfer had not been completed. Moreover the boat had not been delivered, but in fact remained at Bruges in the possession of the original Belgian owner. Even admitting that at the time of capture the ownership had passed from the enemy vendor to the neutral vendee the decision could be no different, since under Article 56 of the Declaration of London, which in its essence was, as already held in the case of the *Cubano*, the same as Article 12a of the German prize ordinance, it would be necessary for the claimant to prove that the sale had not been made to withdraw the boat from the risk of capture, and this he had failed to do. Adverting to the presumption created by Article 56, that a transfer made to neutral registry during war is made for the purpose of obtaining the protection of a neutral flag, the Court said:

"It is not necessary that this should be the sole motive which has animated the contracting parties; it is sufficient that it has been concomitant. The supreme court thinks that this was the fact in the present case. One cannot understand otherwise what would have been the motive which would have induced the owner to sell, in full war, to a neutral, an object finding itself in the hands of the enemy. The sole plausible motive was the desire to put the object beyond the power of the enemy—the claimant has not even attempted to produce proof to the contrary; still less has he succeeded in doing it. Even if before the outbreak of war he had really made an effort to sell the ship, that would prove nothing more than that the war having in the meantime broken out, he had not had in selling it the after thoughts in question."

Sec. 321. Belgian Jurisprudence. Sale Unaccompanied by Delivery of Possession. Transfers Made in Blockaded Ports. In the case of the *Roelfina*[1] the Belgian Prize Commission pronounced invalid the transfer of a vessel made in a blockaded port, from German to Dutch registry. The ship was originally a Belgian vessel which had been captured by a German submarine and condemned by the German Prize Court. The Dutch claimant alleged that the contract of sale was concluded on October 12, 1918, by which the vessel was purchased from the German government and at which time the purchase price had been paid in full. These facts were admitted by the Belgian Prize Commission. But possession had not been delivered and at the time of recapture by the Belgians the ship was still in the port of Bruges and still flying the German flag. It was a

[1] *Moniteur Belge*, 1920, 403; Eng. trans. in 16 *Amer. Jour. Jud. Decs.* 136.

principle, said the Prize Commission, universally admitted by all maritime nations that the transfer during war of an enemy ship to a neutral flag is null in every case where it appears that the transfer has been made for the purpose of evading the consequences to which the vessel would have been exposed by the action of a belligerent. The decision of Lord Stowell in the case of the *Jan Frederik* was cited as authority for the view that the presumption is particularly strong when the transfer has not been followed by delivery. The burden of proof was on the claimant to show that the transfer had not been made with this object in view and this burden he had failed to discharge. The actual military situation, on the contrary, left little doubt that the object of the sale was to withdraw the ship from the danger of capture. At the time it was sold by the German government to the Dutch purchaser the early evacuation by the Germans of Flanders and the Belgian coast was imminent (in fact it occurred eight days thereafter) and it was to prevent the capture of the ship, still lying in the port of Bruges, by Belgium or her allies that animated the German government in selling her. In such a case the motive of the purchaser was immaterial although there was reason to believe that he too was guilty of fraud in thus endeavoring to defeat the legitimate right of a belligerent. Finally, it was asserted that the port of Bruges being under blockade, the transfer of a vessel made therein must according to Article 56 be absolutely presumed to have been invalid and the presumption was not open to rebuttal.[1]

Sec. 322. Colorable Transfers. Cases of the "Kankakee," "Hocking," and "Genesee." [2] The purchase in the early part of the year 1915 from various neutral owners, of ships by agents acting for Hugo Stinnes, a German capitalist who furnished all or the greater part of the money, their transfer to the American Transatlantic Steamship Company, a corporation registered in

[1] A similar case was that of the *Agiena* (*Moniteur. Belge*, 1920, p. 405, Eng. trans., 16 *Amer. Jour. Jud. Decs.*, p. 117), a Dutch ship, which had been captured by the Germans for carrying contraband, condemned by the German Prize Court, and sold by the German government on Oct. 5, 1918, to the same Dutch firm as that which had bought the *Roelfina*. Being recaptured by the Belgians on October 19, 1918, while she was in the port of Bruges and while flying the German flag she was condemned by the Belgian Prize Commission for the reason that the sale to the Dutch purchaser was invalid because the motive of the German government in selling her at a time when the Germans were on the point of evacuating Belgium was manifestly the desire to withdraw her from the consequences of capture. "Under such conditions," said the Prize Commission, "the transfer to a neutral flag must be considered void according to the incontestable principles of international law, confirmed by Article 56 of the Declaration of London."

[2] VIII Lloyd 74.

the State of Delaware, and their admission to American registry in August, September, and October 1915 raised the question of the validity of transfers from enemy owners to a neutral company whose capital was furnished by an enemy subject. It was not a question here of transfers from belligerent to neutral flags but of transfers from one neutral flag to another. The American Transatlantic Company had been lately organized by one Wagner for the purpose of purchasing and operating ships and all the ships purchased by it were neutral owned. The case was different, therefore, from that of the *Dacia* which had been purchased from a belligerent owner. But the funds of the American company were alleged to have been supplied by a capitalist of belligerent nationality. While, therefore, it was nominally and technically a neutral company it was in fact an enemy company, that is, an enemy to Great Britain, whose war ships captured three of the vessels in October and November 1915. It was pronounced by the President of the Prize Court to have been "a bogus company formed in concert with and in the interests of Stinnes, so that the vessels might fly a neutral flag and might be used by them in his own interest or that of Germany and controlled and managed by or for him from Copenhagen." The Court held that the vessels were the property of Stinnes at the time they were transferred to the American company and admitted to American registry; that the transfers "were merely colorable and made in order to evade capture" and that the beneficial interest and the real ownership remained in Stinnes after the transfers and until the captures." In other words, the transfers were regarded as invalid not because they were transfers from a belligerent to a neutral flag but because they represented a transfer of ownership from an enemy subject to a neutral company which he himself financed and controlled, and this for the purpose of obtaining the protection of a neutral flag.

It may be remarked, and this circumstance was dwelt upon by the Prize Court, that at first the American authorities refused to register the ships under the American flag for the reason that they were not satisfied that the vessels were really American owned and therefore entitled to American registry, but after some hesitation the conclusion was reached that since the purchasers were a company incorporated under the laws of Delaware it mattered not who owned the stock or where the company obtained its funds, and consequently the ships were admitted to American registry, shortly before they were captured and while

Article 57 of the Declaration of London was still in effect, the benefit of which the claimants invoked. It may also be remarked that in notifying the Transatlantic Company that its vessels had been admitted to American registry the Secretary of Commerce took occasion to say that the Department had only complied with the "technical requirements of the law" and that registration involved no expression of confidence in the purposes of the company or no assurance that the right of the ships to fly the American flag would not be challenged by belligerents or that they would not be arrested and sent to a Prize Court for adjudication. In short, while registration implied that in the opinion of the American authorities the vessels would have a right to fly the American flag their opinion was not conclusive *vis à vis* belligerents. The rights of the latter in the premises would have to be determined by their own Prize Courts.

The judgment of the Prize Court was affirmed by the Judicial Committee of the Privy Council.[1]

Sec. 323. Case of the "Solveig."[2] Effect of Registration Subsequent to Capture Not Retroactive. Among the ships of the American Transatlantic Company which ultimately found their way into the Prize Court was the *Solveig* which was captured by the port authorities of Marseilles on June 28, 1915. Originally a Norwegian vessel she was sold by her owner to a Danish subject during the course of a voyage from the Dutch Indies to Marseilles, by whom she was later sold to the American Transatlantic Steamship Company. At first the American authorities refused to register the ship (along with the *Kankakee, Hocking,* and *Genesee*) under the American flag, but later admitted her to American registry on August 26, 1915, some two months after her capture. In this respect the case differed from those of the *Kankakee, Hocking,* and *Genesee;* in the latter cases the ships had been admitted to American registry *before* they were captured and therefore according to American law had a right to fly the American flag at the time they were captured. The question before the British Prize Court therefore was whether a neutral flag was conclusive when it protected an

[1] IX Lloyd 111. For further discussion of this case see *supra.* Sec. 284. For the American protest against the seizure of these vessels on the ground that being owned by an American Company they were not liable to capture, see the Communication of the Secretary of State to the British Ambassador May 10, 1916, European War, No. 3, p. 84, *Diplom. Corr. with Bellig. Countries Relative to Neutral Rights and Duties;* also 10 *Amer. Jour., Spec. Supp.,* p. 16.

[2] Fauchille, *Jurispr. Franc.* 126.

enemy owned ship. In the case of the *Solveig,* the ship not having been admitted to American registry prior to her capture and not therefore having a right to fly the American flag, the question was whether her admission to American registry a month and a half subsequent to her capture should be given retroactive effect. Following the rule already laid down in the cases of the *Ariadne* and others,[1] the Prize Council held that "in conformity with a generally recognized and applied principle of the law of nations, in determining the validity of a capture, it is the date of the capture that the civil status and the neutral or enemy character of a captured ship must be determined" and that "all sales, transfers, or registrations made subsequent to the date of capture are without effect either beneficially or prejudicially upon the rights of captors or claimants." Consequently the admission of the *Solveig* to American registry after capture did not give her the character of an American ship at the time of capture. But as a consequence of the sale during the voyage she had lost her Norwegian nationality and there were no papers on board at the time of capture to establish her right to fly any neutral flag at all. Since the character of the ship could not be determined by her flag, in accordance with Article 57 of the Declaration of London, it was necessary to determine her character by her ownership. This did not involve going behind the flag and "breaking through the shell" or "tearing off the mask" created by article 57, as the British Prize Court did in the case of the *Kankakee* and others, because there was no legal flag to go behind. Applying the rule of ancient prize law which places upon the captain of a neutral ship the burden of proving neutral ownership, the Prize Council held that this burden was not discharged and that the *Solveig* must be regarded as a German ship, for the same reason for which the British Prize Court condemned her sister ships, the *Kankakee* and others.

Upon appeal to the Council of State,[2] the appellants contended that Article 56 was not applicable to the case because it had reference only to ships transferred from belligerent to neutral flags, whereas the transfer of the *Solveig* was from one neutral flag to another; that the old *règlement* of 1778, relied upon by the Prize Council, applied only to ships encountered at sea and not to those which, like the *Solveig,* had been freely admitted to a national port (Marseilles) and were therefore

[1] *Supra,* Sec. 279.

[2] 30 *Rev. Gén.* (1923) *Jurispr.* 33.

entitled to the protection of the local authorities and immune from capture; that if there were no papers on board at the moment of capture it was because they were temporarily in the hands of the consular authorities for verification of the certificate of American registration; and finally that the French decree of October 23, 1915, modifying article 57 of the Declaration of London, could not be applied in a case decided in September, 1915. The Council of State without discussing these various grounds of appeal affirmed the judgment of the Prize Council on the ground that there were actually no papers on board at the moment of capture to establish the right of the *Solveig* to fly any neutral flag whatever; that subsequent registration under the American flag could not be given a retroactive effect; and that the evidence showed that "the true instigators of the purchase of the *Solveig* and other vessels constituting the fleet of the American Transatlantic company had acted for the account of the nationals of an enemy power, who had furnished the necessary funds for the realization of this operation and that the transfer of the ownership of the vessels in question could not, having regard to the conditions under which the sale was made, be considered as a sufficient presumption of neutral character attached to the captured ships."

Sec. 324. Transfer by Neutral Subject Domiciled in Enemy Country to an Enemy Subject. In the case of the *Kara Deniz*,[1] the Privy Council affirmed the judgment of the Prize Court at Bombay condemning a vessel which had been sold by its owner, a naturalized Persian subject (Turkish by birth), domiciled and engaged in business in Constantinople, to a Turkish subject in August, 1914, some three months before the outbreak of war between Great Britain and Turkey. The Prize Court at Bombay held that although the transfer had been completed by the fifth of August, 1914, and the vessel was therefore entitled to fly the Persian flag at the time she was captured, the Court was not satisfied that a collusive arrangement had not been made between the original Turkish owner and the purchaser by which the former was to retain control of the ship and that the transfer had not been made merely for the purpose of allowing the vessel to return to Turkey under the Persian flag and to be used in assisting the Turkish government. After an adjournment for further evidence the Court condemned the vessel on the ground that the pur-

[1] III Br. & Col. Pr. Cas. 1070.

chaser's commercial domicile was in Turkey and that he had never taken any steps to divest himself of that domicile. The decision therefore involved a question of domicile rather than the validity of the transfer of the ship.[1]

Sec. 325. Transfer from German to Turkish Registry After Armistice with Turkey. Differing somewhat from the case of the *Colonia* was that of the *Souhl* ex *Corcovado*,[2] a ship belonging to the Hamburg-American Line and sold to a Turkish company acting for the Turkish government in November, 1918, between the dates of the armistice with Turkey and that with Germany and transferred to the Turkish flag under the name of the *Souhl*. She was captured by a French cruiser in the harbor of Constantinople Jan. 31, 1919. Under the terms of the armistice German ships still remained liable to capture whereas Turkish ships did not. The transfer was held by the French Prize Council to have been invalid, mainly on the basis of the *règlement* of July 26, 1778, "still in force" and upon which the Prize Council had already held the transfer of the *Dacia* to be invalid. Considering, it said, that the purpose of the said *règlement* was to prevent belligerents from evading the principle laid down by the marine ordinance of August, 1681, according to which all enemy ships are good prize, there was place to apply the *règlement* "in all its spirit and to treat as fraudulent every sale having the object contemplated, whatever the date at which it may have been made." Consequently the sale must be regarded as having been made to withdraw the vessel from the risk of capture to which it was exposed.

Sec. 326. Conclusions. It will be seen from this review of prize jurisprudence relative to the transfer of flags that the prize tribunals of all the belligerent countries, except those of Great Britain, interpreted rigorously the rules governing transfers and that practically no transfers made during the war were sustained as valid. Even when claimants were given the benefit of the provisions of the Declaration of London those provisions were interpreted in such a manner as to make it impossible for claimants to discharge to the satisfaction of the Prize Court the burden of proof that was placed upon them. The German and French prize tribunals insisted that claimants were bound to prove that all contested transfers made subsequent to the outbreak of war would have been made just the same had not war supervened and that claimants must also prove that the

[1] See Sec. 324, *supra*.

[2] 27 *Rev. Gén.* (1920), *Jurispr.* 60.

motive of the transferee was not to withdraw vessels transferred, from the risk of capture to which they would have been exposed as enemy ships. This would be an impossible burden in most cases and it proved to be so in the cases which came before the German and French Prize Courts. In holding that vessels while refugeeing in neutral ports and which were transferred to neutral flags could only have been transferred for the purpose of withdrawing them from the risk of capture—a risk to which in fact they were not exposed—they virtually denied the possibility of all transfers made after the outbreak of war.

The view of the British Prize Courts in this respect was more liberal. It had always been a principle of British prize law that *bona fide,* fully perfected, and unconditional transfers made after the outbreak of war, were to be deemed as valid. This rule, the Privy Council said in the case of the *Edna,* had not been changed by Article 56 of the Declaration of London except in so far as it threw the onus of proving the *bona fides* upon the purchaser. The Article was aimed at colorable and fictitious transfers only and the burden of proof consisted only in showing that the motive of the transferee was innocent. This interpretation, it is submitted, was more in accord with the evident intentions of the Naval Conference, and under it transfers made after the outbreak of war will be possible in some cases, whereas according to the French and German interpretation it is difficult to conceive any circumstances under which the validity of transfers can ever be established.

CHAPTER XI

NATIONALITY OF GOODS CAPTURED AT SEA. ENEMY CHARACTER

I

Preliminary Observations

Sec. 327. Questions Involved. The liability to capture and confiscation of goods carried at sea like that of the ships which carry them, depends upon their national character. Few questions were the subject of more frequent prize adjudication during the World War and probably none raised more perplexing difficulties for the Prize Courts. Among the particular forms which the general question assumed were: whether in given cases cargoes found on enemy ships were or were not confiscable, whether the owners of goods sunk with the ships on which they were laden were entitled to indemnities, whether goods otherwise innocent were liable to confiscation by reason of their being "infected" by the presence of contraband, whether enemy goods found on neutral ships and therefore protected by the Declaration of Paris were nevertheless confiscable in virtue of the measures of reprisal adopted by certain belligerent governments, whether goods found on non-enemy ships engaged in unneutral or hostile service were liable to condemnation, etc. The judgments of the Prize Courts, especially of Great Britain, in many of the cases are elaborate and involved and it is not always easy to follow them in the tortuous processes by which they endeavored to unravel what often proved to be complicated and tangled skeins.

Sec. 328. Rule of the Declaration of London. Article 58 of the Declaration of London enunciates the rule that "the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner." Unfortunately, the rule does not lay down any principle by which the enemy or neutral character of the owner is to

be determined. It furnishes a solution therefore for only a part of the problem. Regarding the test to be applied in determining the neutral or enemy character of the owner, the powers represented at the London Conference were equally divided and no agreement could be reached on this fundamental question. France, Germany, Austria-Hungary, Italy, and Russia maintained that the sole test was the nationality of the owner; Great Britain, the United States, Japan, the Netherlands, and Spain, on the other hand, insisted that both nationality and domicile should be taken into consideration.[1] The failure to reach an agreement left each party free to apply whichever rule it preferred. Article 58 introduced one slight modification of the Anglo-American practice, which treated the produce of an estate in enemy territory though belonging to a person of neutral nationality, as having an enemy character. The Article by making the enemy character of goods dependent entirely on the enemy character of their owner removed the exception to the general rule. Since the Declaration of London, though at first put into effect, was subsequently withdrawn, the new rule was not binding and in fact the English Prize Courts applied the old rule. It may also be observed that the rules of the Declaration regarding transfers of ships before and in anticipation of the outbreak of war were not extended to the ante bellum transfer of goods, in consequence of which the character of goods transferred to a neutral subject under these circumstances would depend upon the national character of the owner at the time of capture. The effect of this rule was to supersede the doctrine of Lord Stowell that goods transferred in expectation of war retain their original character.[2] But after the withdrawal of the Declaration the rule ceased to be binding on the Prize Courts, which then applied the traditional doctrine enunciated by Lord Stowell.

By Article 59 of the Declaration it was laid down that in the absence of proof of the neutral character of goods found on board an enemy vessel they are presumed to be enemy goods. This rule was in accordance with the general practice and was therefore merely declaratory of an existing rule of prize law and it was the rule, in fact, applied by the Prize Courts during the World War. They all interpreted it as putting the onus upon the claimant to prove that the goods were neutral.

[1] Bentwich, the *Declaration of London*, p. 112.
[2] The *Jan Frederick*, 5 C. Rob. 128.

By Article 60, the transfer of enemy goods to a non-enemy person during the course of a voyage after the outbreak of war, is invalid so far as the rights of captors are concerned; that is, they retain their enemy character until they reach their destination. This provision is different from that relating to the transfer of ships after the outbreak of war in that it pronounces absolutely the invalidity of transfers of goods made *in transitu*, whereas in the case of ships it creates only a presumption of invalidity which in some cases is rebuttable. This rule is also in accordance with the general practice and prize jurisprudence and is based upon considerations of justice and equity.

Sec. 329. Rules Embodied in Prize Regulations. While the Declaration of London left open the question of the test to be applied in determining the neutral or enemy character of the owner of goods, the majority of the belligerent powers had already promulgated before the outbreak of the war, or did so during the war, prize regulations which laid down the rule which they proposed to observe. Among those which made the nationality of the owner the sole or primary test were Germany,[1] France,[2] Italy,[3] Japan,[4] and Russia.[5] Among those which, on the other hand, adopted the rule of domicile were China,[6] Great Britain,[7] and the United States.[8] Roumania adopted the rule of domicile but at the same time applied the rule of nationality in the case of enemy subjects domiciled in neutral territory.[9] The prize regulations of Austria-Hungary did not lay down a definite rule for the determination of the question.[10]

It should be observed that during the World War both Great Britain and France departed from their traditional rules, in their legislation respecting trade with the enemy. Thus France, where nationality was regarded as the primary test for the de-

[1] Prize Code, Sec. 20 b. But in case the owner had no nationality or possessed neutral as well as enemy nationality, the character of the goods were to be determined by the domicile of the owner.

[2] Instructions (revision of 1916), Art. 28. Nationality adopted as the sole test.

[3] Rules of March 25, 1917, Art. 21. Nationality the sole test.

[4] Law of 1914 relative to naval war, Art. 21. But domicile was made the test in case of double nationality. In adopting the criterion of nationality Japan departed from the principle formerly maintained by her.

[5] Prize regulations of 1895 (Art. 10); in effect during the World War.

[6] Regulations governing capture at sea, Article 4.

[7] The British government did not issue a code of prize regulations but in various Orders in Council, notably that of March 15, 1915, relative to reprisals against Germany, the traditional English rule of domicile was laid down.

[8] *Instructions*, 1917, Art. 59. "Commercial" domicile of the owner.

[9] *Cod.*, Art. 53. Cited by Verzijl, p. 439.

[10] *Dienstbuch*, Art. 45.

termination of enemy character, by a decree of September 27, 1914, forbade trade not only with enemy subjects wherever residing but also with non-enemy subjects residing in enemy country, thus combining both the principles of nationality and domicile. Likewise, the British Parliament by its so-called "black list" legislation extended the prohibition in respect to trading with the enemy to apply to persons not resident in enemy territory whenever *by reason of the enemy nationality or enemy association of such persons* it appeared expedient to do so. Sir Edward Grey in a communication of October 10, 1916, to the American ambassador at London,[1] thus stated the old practice and the reason for departing from it during the world war:

"As the United States government are well aware, the Anglo-American practice has in times past been to treat domicil as the test of enemy character, in contradistinction to the continental practice, which has always regarded nationality as the test. The Anglo-American rule crystallized at the time when means of transport and communication were less developed than now, and when in consequence the actions of a person established in a distant country could have but little influence upon a struggle. To-day the position is very different. The activities of enemy subjects are ubiquitous, and under modern conditions it is easy for them, wherever resident, to remit money to any place where it may be required for the use of their own government, or to act in other ways calculated to assist its purposes and to damage the interests of the powers with whom it is at war. No elaborate exposition of the situation is required to show that full use has been and is being made of these opportunities."

The American government after having as a neutral protested against the British "black list" measures adopted a similar policy upon the entrance of the United States into the war. The new policy was contrary to the traditional English rule enunciated during the war in the case of *Porter* v. *Freudenberg,* where it was said: "it is clear that the test is not nationality but the place of carrying on the business." [2] It is not unlikely that in future wars belligerents will not be content to rely entirely upon one or the other tests but will combine the two and apply both as their national interests may require.

Sec. 330. Burden and Nature of Proof. The rule laid down in Article 59 of the Declaration of London and embodied in the prize regulations of many states, that in the absence of proof of the neutral character of goods found on board an enemy

[1] Spec. Supp. to 11 *Amer. Jour. of Int. Law,* 45.
[2] As to this see my *International Law and the World War,* Vol. I, Ch. 8.

vessel they are presumed to be enemy goods, was, as stated above, applied by all the Prize Courts and was interpreted as placing the onus of proving the contrary on the claimant. The question first came before the British Prize Court in the case of the *Roland*[1] in March, 1915, where it was contended by the claimant that the presumption that goods on an enemy ship were *prima facie* enemy property only applied to goods shipped after the outbreak of war. Sir Samuel Evans thus disposed of the point:

"I think it is abundantly clear, according to prize law, that property upon an enemy ship consigned to an enemy port is *prima facie* enemy property, and it is for the claimants, who allege that the property belongs to them, as neutrals, to make out their case, and to make it out clearly. No authority is required for that, though several authorities have been referred to in the course of the arguments. I am content to say that this is, and ought to be, the presumption in cases of this description."

The same question was raised before the Ceylon court of admiralty sitting in prize in the case of the *Australia*[2] decided in March, 1916. After quoting with approval Sir Samuel Evans' decision on this point in the case of the *Roland,* the Court said:

"Counsel for the controllers argued that that ruling was inapplicable to the present case, inasmuch as here the cargo was not consigned to an enemy port. I do not think, however, that Sir Samuel Evans intended to engraft any such limitation upon the principle that he was affirming. He was merely touching upon a circumstance disclosed by the particular facts which he had at the moment to deal with. The arguments of counsel on both sides in the case of the *Roland* support this view, which is corroborated also by the commentary of the International Naval Conference on article 59 of the Declaration of London: 'Article 59 gives expression to the traditional rule according to which goods found on board an enemy vessel are, failing proof to the contrary, presumed to be enemy goods; this is merely a simple presumption, which leaves to the claimant the right, but at the same time the onus, of proving his title.'"

[1] II Lloyd, 253; I Br. & Col. Pr. Cas. 188.

[2] II Br. & Col. Pr. Cas. 315. See also the decision of the Cape of Good Hope division of the supreme court of South Africa in the case of the *Birkenfels No. 2* (So. Afr. Cases 33), where it was contended that in the case of goods shipped on an enemy vessel before the outbreak of war and consigned to British subjects in Australia the onus was on the admiralty and not on the consignees to prove non-enemy ownership. But the Court held that it saw no reason to depart from "the ordinary general principle that where a party lays claim to property he must, before he can succeed or before the goods can be given up to him, produce some evidence to show his ownership of the goods." See also the case of the *Hypatia* (VI Lloyd 62), where Sir Samuel Evans, reaffirming the rule, said: "It is clearly established in the law of nations that claimants must prove their non-hostile character at the time of capture."

The French Prize Council likewise affirmed that the rule which places upon the claimant in such cases the burden of proof was a "constant and uncontested principle."[1]

The German Supreme Prize Court applied the same rule and added that the legal presumption of enemy ownership in the case of goods found on an enemy ship was not destroyed by simple proof that the goods were neutral property at the time they were laden on board the ship.[2] The Italian Prize Commission likewise held that goods laden on an enemy ship must be presumed to be enemy goods in accordance with Article 59 of the Declaration of London unless it was proved that they belonged to a house of non-enemy nationality,[3] but, on the contrary, they must be presumed to be neutral when a non-enemy subject was in possession of the bill of lading[4] and proof of ownership might be established by production of the bill of lading and other documents relating to the goods.[5] But the production simply of documents of an "artificial character" showing that immediately before the outbreak of the war the neutral claimant had acquired from an enemy subject the ownership of the goods, was not sufficient to overcome the presumption of enemy ownership.[6] Likewise the failure of a non-enemy consignee to produce the bill of lading or to furnish any reason for his failure to do so but produced only a receipt of embarcation and an invoice, left the presumption of enemy ownership unrebutted.[7] But where goods found on a vessel flying the flag of the captor state, an allied state, or a neutral state, the burden of proof that they were enemy goods rested upon the captor and not upon the claimant. In such cases the presumption of ownership was reversed, the presumption being that they were of non-enemy ownership.[8]

Sec. 331. What Must Be Proved? Claims of Mortgagees, Pledgees, Insurers, Etc. As a general principle the claimant of goods or of indemnity, in case of destruction, must prove that they were of non-enemy ownership at the time of capture or destruction. Proof merely that as the purchaser bearing the

[1] The *Porto*, Fauchille, *Jurispr. Franc.* 137. See also the decision of the Council of State in the case of the *Eir* (*ibid.*, 244) and the decision of the Prize Council in the case of the *Bocroe* (*ibid.*, 53).
[2] The Eskimo (I *Entsch.* 383; Fauchille et De Visscher, *Jurispr. All.* 292).
[3] The *Ambra* (cargo) (Fauchille et Basdevant, *Jurispr. Ital.* 99).
[4] Same case (*ibid.*, 73).
[5] Same case (*ibid.*, 109).
[6] The *Moravia* (*ibid.*, 35).
[7] Same case (*ibid.*, 55.)
[8] See the English cases of the *Aldworth* (I Lloyd 137), the *Miramichi*, *ibid.*, 157; and the *Roumanian* (appeal, II, *ibid.*, 378), and the French case of the *Vénézuéla*, 27 *Rev. Gén.* (1920), *Jurispr.* 8. See further as to the burden of proof, Secs. 84-85, *supra*.

risk of transportation but without yet being the actual owner, or that as the mortgagee or insurer he would suffer the financial loss resulting from their condemnation, was not sufficient to secure their release or an indemnity in case they were destroyed. The British Prize Courts without exception dismissed the claims of banks and mortgagees of neutral and even of British and allied nationality and affirmed that the exclusive test of the enemy or non-enemy character of goods and hence their liability to confiscation or their immunity from capture was the fact of full ownership. The test was not upon whom the risk falls in case of confiscation but whose goods they are at the moment of capture. In the case of a neutral claimant proof had to be adduced to show that at the time of capture the ownership had passed to and become vested in him, in order to obtain their release.[1] Mere "beneficial" ownership such as a mortgagee, pledgee, or insurer might assert was not sufficient; it must be full, unqualified, legal ownership.[2] Regarding the contention of the claimants that their beneficial interest in the cargoes should be recognized, Sir Samuel said: "To accede to this proposition would be to open a door for all sorts of inquiries and calculations, which has been consistently and firmly closed by my predecessors and by courts of prize.

"Such proceedings would be wholly foreign to the jurisdiction and working of this Court. That persons may be losers during war time in pecuniary or commercial transactions with enemy traders is only too obvious. Loss is no test of legal rights. The claimants have rights of action against their customers for their full claims, which they can set in motion either during the war or after it. How far they might be fruitful is no concern of this Court. In my judgment the only safe guiding principle is to ascertain who are the legal owners of the cargoes; and, if the goods are found to be the property in law of an enemy, to condemn them; if they are the property of neutrals or British subjects, to release them, as was done in the *Miramichi*."[3]

Sec. 332. The Same (Continued). Sir Samuel reaffirmed the view here expressed, in the cases of the *Woolston* and the *Syria*,[4] and it was followed by the South African Prize Court.[5] Appeal being taken from the decisions in the cases of the *Odessa*

[1] The *Miramichi*, I Lloyd 157; I Br. & Col. Pr. Cas. 137.
[2] The *Odessa* and *Cape Corso*, I Lloyd 301; I Br. & Col Pr. Cas. 137.
[3] As to this see further, *supra*, Secs. 37-38; 116-117; 122.
[4] I Lloyd 332 and II, ibid., 100. See also the cases of the *Eumaeus*, *Parchim* and others referred to below in Secs. 352, 379, where it was laid down that enemy property seized by captors is taken free of all incumbrances held by mortgagees, pledgees, etc.
[5] *Cargo ex Rufidji and Hamm.*, So. Afr. Cases 33.

and *Woolston,* the view of Sir Samuel Evans was affirmed by the Judicial Committee.[1] Lord Mersey, speaking for the Judicial Committee and adverting to the right of capture, stated that the question of national character depended upon the ownership at the date of seizure and he added that this criterion was not "a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application and therefore peculiarly appropriate to questions with which a court of prize has to deal."

"There is a further reason for the adoption of the rule. If special rights of property created by the enemy owner were recognized in a court of prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case, borrow on the security of the goods an amount approximating their value, from a neutral lender, and create in favour of such a lender a charge or lien or mortgage on the goods in question. He would thus stand to lose nothing in the transaction, for the proceeds of the goods if captured would, if recovered by the lender, have to be applied by him in discharge of his debt."

After a lengthy review of the decisions he concluded that the so-called right of "special" property which pledgees and mortgagees claim to have in ships and cargoes is "in truth no property at all."

"The very expression 'special property' seems to exclude the notion of that general property which is the badge of ownership. If the pledgee sells, he does so by virtue and to the extent of the pledgor's ownership, and not with a new title of his own. He must appropriate the proceeds of the sale to the payment of the pledgor's debt, for the money resulting from the sale is the pledgor's money to be so applied. The pledgee must account to the pledgor for any surplus after paying the debt. He must take care that the sale is a provident sale, and if the goods are in bulk he must not sell more than is reasonably sufficient to pay off the debt, for he only holds possession for the purpose of securing to himself the advance which he has made. He cannot use the goods as his own. These considerations shew that the right of sale is exercisable by virtue of an implied authority from the pledgor, and for the benefit of both parties. It creates no *jus in re* in favour of the pledgee; it gives him no more than a *jus in rem* such as a lien holder possesses, but with this added incident, that he can sell the property *motu proprio* and without any assistance from the court."

The contention of the claimants that the condemnation of goods in such cases would fall heavily upon innocent English subjects who had advanced money on the cargoes in time of

[1] II Lloyd 405; I Br. & Col. Pr. Cas. 554.

peace before war was ever thought of, and that the Court ought to depart from the old decisions which were made long before the present practice of making such advances had become common was disposed of as Sir Samuel had done. The law was settled and the Prize Court could not change it. There was a remedy in the bounty of the Crown and to that source they must look for redress of their hardships.[1] As to the suggestions of the appellants that the rules laid down in the old decisions should be confined to transactions originating during the war and that liens created *bona fide* before the war might well be recognized whether held by British subjects or neutrals, the Judicial Committee thought there was no authority for such a distinction—indeed the authority was the other way. This view was reaffirmed by the Privy Council in the case of the *Parchim*,[2] where Lord Parker stated that the rule laid down in the case of the *Odessa* which finally determined not only that property (ownership) as opposed to risk was the real criterion but that the property to be looked for was the general property as opposed to any special proprietary right, was binding on all courts.[3]

Sec. 333. The Same (Continued). German Decisions. The German Supreme Prize Court, like the British Prize Court, held, overruling the Prize Court at Hamburg, that in accordance with Article 115 of the prize ordinance, which was in accord with Article 58 of the Declaration of London, the nationality of goods found on a neutral ship which had been destroyed must be determined not by the nationality of the persons supporting the risk during their transportation but by the nationality of the owner.[4] The decision of the lower court that the nationality of the person bearing the risk was decisive, the supreme court thought was contrary not only to the text of Article 115 of the prize ordinance but with the intention of its authors. This article was based on Article 58 of the Declaration of London and the discussion of the latter article at the London Naval Conference left no doubt that the Conference intended to make the nationality of the owner the test. It was true that the German delegation at the Naval Conference advocated the risk test but Germany's view did not prevail and the Commission charged

[1] See Secs. 38-39, *supra*.
[2] IV Lloyd 390; II Br. & Col. Pr. Cas. 489.
[3] This statement is repeated by Lord Parmoor in the case of the *Derflinger* (VII Lloyd 399).
[4] The *Arena*, I *Entsch.* 343; Fauchille et De Visscher, *Jurispr. All.* 258.

with examining the question expressed the opinion that it was preferable to retain the rule of the *Consolato del Mare,* according to which the ownership of the goods was the test of their neutral or enemy character. In conformity with this view the Conference decided to retain the old rule.[1] In this case the Prize Court held that the ownership of the goods had not passed from the neutral sellers to the enemy purchaser at the time of capture since the latter had not acquired possession of the documents or had only received them after the destruction of the cargo, that is to say, at a time when the transfer of ownership was impossible.[2] In the case of the *Björ,*[3] the supreme Court again overruled the lower Prize Court and held that an insurer of goods destroyed with a neutral vessel on which they were laden was not entitled to damages when at the moment of destruction the ownership was still in the neutral seller, even though the insurer had paid the insurance on the goods lost.[4]

Sec. 334. The Same. French Jurisprudence. The French Prize Council following the rule applied by the British and German Prize Courts held that the rights of mortgagees, pledgees and insurers of enemy goods were not rights of ownership in the sense of prize law and could not be recognized by the Prize Council as taking precedence over the rights of captors, even when in the case of an insurer or mortgagee the property would if it were released be delivered to them. Absolute ownership at the time of capture alone was held to be the proper test of the enemy or neutral character of the goods and not the risk upon whom the loss would fall. Only the legal owners at the time, therefore, could be recognized as rightful claimants for restitution or indemnity.[5]

Sec. 335. The Same. Italian Jurisprudence. The Italian Prize Commission however adopted a different view regarding the rights of non-enemy mortgagees of goods on enemy ships in Italian ports at the outbreak of the war. By Article 6 of the

[1] As authority for this statement the Court quoted Schramm, *Das Prisenrecht,* 1913, pp. 526 ff. and 123 ff.

[2] To the same effect see the cases of the *Hyades* (I *Entsch.* 180) and the *John Wilson* (*ibid.,* 326).

[3] I *Entsch.* 48.

[4] To the same effect see the case of the *Papelera* (I., *ibid.,* 334), where the supreme court held that a neutral insurer of goods destroyed with a neutral vessel on which they were laden and who had paid the amount of the insurance was not entitled to claim an indemnity for the value of the goods when he was unable to prove that the ownership was in him at the time of the destruction.

[5] See, among others, the cases of the *Eir* Nos. 1 and 2 (Fauchille *Jurispr.* Franc. 32, 88), the *Colonia* (*ibid.,* 50), the *Marienbad* (*ibid.,* 390) and the *Kirkoswald* (*ibid.,* 441, and 28 *Rev. Gén.,* 1921, *Jurispr.* 9).

decree of May 30, 1915, relative to the treatment of such ships, it was provided that neutral goods found on them should be released, under reserve of the right of requisition upon payment of the value thereof.[1] In the important case of the *Moravia* No. 1,[2] an Austrian merchant vessel seized in an Italian port, an English bank had by advancing the value of the cargo on the bill of lading acquired the right of a mortgagee (*diritto di pegno, droit de gage*). The Prize Commission held that it was the nationality of the bank which must determine the nationality of the goods "when by reason of the circumstances the mortgagee's right dominates and absorbs the rights of the sellers and purchasers and when the bank demonstrated by means of documents the existence of a juridical interest in exercising over the goods all the rights of ownership. The mortgagee being of non-enemy nationality the goods must be regarded as non-enemy property."[3] As the decree referred to, regarding the release of neutral goods captured on enemy ships, applied only to vessels found in port at the outbreak of the war and since the cases dealing with the rights of mortgagees were limited to cargoes laden on ships seized in port, it is not known whether the Prize Commission would have reached a different conclusion in the case of captures made at sea. It would seem that there is no valid reason for such a distinction.

As Italian jurisprudence stands therefore it is less rigorous than that of the prize tribunals of other countries, in regard to the rights of mortgagees, pledgees, lien holders, etc., of enemy *cargoes*. Nevertheless, as pointed out above, the Italian Prize Commission adopted the same view as the Prize Courts of other countries in regard to the rights of mortgagees of enemy *ships* seized in port at the outbreak of the war.[4]

II

Nationality and Domicile as Tests of Enemy Character

Sec. 336. The Rule of Nationality. As pointed out above (Sec. 328), the Declaration of London (Art. 58) laid down the

[1] Text of the decree in Fauchille et Basdevant, *Jurispr. Ital.*, Annexe 7, p. vii.
[2] *Ibid.*, 35.
[3] The same conclusion was reached in the case of the *Moravia* No. 8 and in the *Ambra* No. 1 (*ibid.*, 74).
[4] See the case of the *Myrza Blumberg* (Fauchille et Basdevant, *Jurispr. Ital.*, p. 393).

rule that the neutral or enemy character of goods found on board an enemy ship should be determined by the neutral or enemy character of the owner, but it did not pronounce on the question whether the character of the owner should be determined by his nationality or by his domicile and that some states in practice applied the one criterion and some the other. Of the two, perhaps the test of nationality is the simpler and it would seem the more logical criterion.[1] Its application ordinarily gives rise to controversies only in cases of double or doubtful nationality or where the owner possesses no nationality at all. In practice, the application of the rule of domicile by the British Prize Courts during the late war raised many questions, some of which were difficult to determine. They related generally to the determination of the domicile of individuals and the nationality of registered British companies when their directors or share holders were composed wholly or in part of enemy subjects.

The Continental Prize Courts uniformly applied the test of nationality when the claimant was a neutral by nationality but was domiciled in enemy country. Thus the German Prize Court held that goods shipped to and belonging to a Swiss subject domiciled in France were neutral property,[2] and that the presumption was against enemy destination in the case of goods shipped to England and resold there by a Dutch merchant domiciled in London.[3] The Italian Prize Commission appears to have adopted the same view in a case where it held that the nationality of goods seized on an enemy ship must be determined by the nationality of the bank which had a property right in them and the nationality of the bank being neutral in this case the goods must be released.[4]

[1] But at the London Naval Conference the British memoranda suggested that the principle of domicile was "both sounder and more practical," although the British delegation was instructed that the principle was not of such importance as to make insistence upon it a vital matter. It was argued that the principle of domicile responded better to the right of capture since it alone permitted a blow to be struck at enemy commerce; besides, it was a more practical test since the fact of domicile was more easily determined than the fact of nationality was. The German delegation, on the contrary, maintained that the adoption of the principle of domicile would be incompatible with the German system of national defense and that it would have the effect of rendering immune from capture the goods of an enemy subject domiciled in neutral territory while a ship belonging to such a person and flying his national flag would be confiscable.

See on this matter an article by Mr. Malcolm M. Lewis entitled "Domicile as a Test of Enemy Character," in the *British Year Book of Int. Law*, 1923-24, pp. 62 ff.

[2] The *Kediri*, II *Entsch.* 275.

[3] The *Lestris*, II, *ibid.*, 207; Fauchille et De Visscher, *Jurispr. All.* 302.

[4] The *Ambra*, Fauchille et Basdevant, *Jurispr. Ital.*, 73.

The effect of the change from enemy to neutral nationality during the war appears not to have arisen in connection with the ownership of goods in any cases, although it was raised in several instances in connection with captures of ships. The ancient French jurisprudence which refuses to recognize the validity of changes of nationality during war, so far as it affects the right of capture, was followed by the French Prize Council during the late war.[1] There were also some cases involving the effect of changes of nationality due to the belated entrance of certain countries into the war and to the conclusion of peace between the claimant's state and the captor state.[2]

Sec. 337. The Test of Domicile. The ancient criterion adopted by the British Prize Courts and applied by them during the late war was that of "commercial" or "trade" domicile, which they distinguished sharply from "civil" or "personal" domicile. According to this rule a person even though of enemy nationality is not considered an enemy in respect to the liability of his property to capture if he has a commercial domicile in a neutral or allied country. On the contrary, if he is of non-enemy (neutral or allied) nationality but has a commercial domicile in enemy territory, he is considered to be an enemy, certainly unless he withdraws from the enemy country within a reasonable time after the outbreak of war and thereby purges himself of his domiciliary enemy character. Likewise a person domiciled in a neutral (or allied) country and who has a house of trade in enemy country is treated as an enemy in respect to the trade of such house. On the other hand, where a person domiciled in enemy country and who has a house of trade in a neutral (or allied) country the goods belonging to such house have equally an enemy character. These are the general principles underlying the English rule of domicile.

Sec. 338. Distinction Between "Commercial" and "Civil" Domicile. As already stated, Anglo-American jurisprudence

[1] See notably the *Proconnissos*, Fauchille, *Jurispr. Franc.* 335.

[2] See, for example, the German case of the *Blommersdijk*, II *Entsch.* 108. See also the case of the *Blonde*, *Hercules*, and *Prosper* (III Br. & Col. Pr. Cas. 1031), where the claimants to certain vessels seized by the British at the outbreak of war, originally German, had become by the Treaty of Versailles, citizens of Dantzig, at the time of the prize proceedings and whose claim to be in a better position than they would have been had they remained German subjects, was denied by the Privy Council. See also the German case of the *Kjell* (II *Entsch.* 217), involving the question whether the conclusion of peace between Germany and Finland subsequent to the destruction of a Swedish ship with its cargo, gave the Finnish claimant of the cargo a right to damages. Also the French case of the *Mercur* referred to in Sec. 317, note 2, *supra.*

distinguishes between "commercial" and "civil" domicile, each being governed by different rules of law. In determining the former, actual residence is the primary test, whereas in the case of the latter intention is the dominating factor. Judge Cator of the Prize Court of Egypt discussed at length in the case of the *Annaberg*[1] the distinction. Referring to the contention of the Crown that the property of the claimant, a German who had for some years resided and carried on business in Australia, should be condemned, unless he could show that he had no German domicile, Judge Cator said:

"I think this contention is based upon a certain confusion of ideas as to the meaning of the word domicile. The word is a term of art in English law. There are times when it becomes necessary to determine the country in which a man has, or is deemed to have, his permanent home, and that country we call his domicile. It may be a domicile of choice, for it is open to every one to choose his own home. Or it may be one of origin; but a domicile of some kind he must have. This domicile, which for convenience, following Dicey, I will refer to as civil domicile, is founded on intention. It is generally accompanied by residence but residence alone does not constitute civil domicile. To ascertain this domicile is sometimes no easy matter; but I need not enlarge upon the tests and presumptions which the law employs to decide the question, or the difficulties which may attend such enquiries.

"Quite apart from his civil domicile, prize law recognizes another relationship which a man may have with a country by trading in it. This relationship is usually termed a 'trade' or 'commercial' domicile. Here intention plays but a minor part. The intention to trade is usually patent from the conditions, and it will be but seldom that such questions of intention will need to be determined as came before the Court in the case of the *Harmony* (2 C. Rob. 322; 1 Eng. P. C. 241). Commercial domicile is a loose cloak, easily assumed and as easily discarded. It is acquired by the mere act of residing and trading in a country. It is lost so soon as a man

[1] II Br. & Col. Pr. Cas. 241. The English civil courts in several cases had occasion to discuss the law of domicile and the distinction between the two kinds. Thus Lord Justice Scrutton in *Tingley* v. *Müller* (1917, 2 Ch. 172-3), said: "Either party by trading or residing in a neutral country might acquire for the time being a neutral character. The conditions under which this loss of national character might be achieved and under which the new character by residence might be lost have been carefully considered by Lord Stowell in several cases where questions were in dispute. The conditions of this character are sometimes called 'domicil,' but by that phrase is not meant 'civil domicil'—what Lord Lindley calls 'real domicil'—but a condition more easily acquired and lost, called by some of the text writers 'commercial' or 'trade domicil'—'domicile in a peculiar sense differing considerably from ordinary domicile, which is known as trade domicile in war, but is equally applicable to persons not engaged in trade.' . . . Civil domicil is such a permanent residence in a country as makes that country a person's home. Commercial domicil is such a residence in a country for the purpose of trade or otherwise as makes a person's trade or estate form part of its resources."

The decisions of both the civil and Prize Courts on the subject are reviewed by Lewis in the article referred to above.

gives up his residence and trade. It is a creature of circumstance rather than intention. So much so that it is quite possible for a man to have a civil domicile in one country and at the same time to be possessed of a trade domicile elsewhere. Residence, which is immaterial to the conception of civil domicile, is essential to constitute a trade domicile, using that term in the sense generally attributed to it in the text books. But the residence must, I think, be of a semi-permanent character."

He added:

"So far as I am aware, that term was never made use of by Lord Stowell. I believe it to be a phrase coined at a later date which expressed in convenient form the idea of a man who trades in a country and to all appearance lives there permanently. There is no doubt that Lord Stowell had such an idea in his mind on many occasions when he speaks of a man having made himself a trader of a country. But, as I understand it, a commercial domicile must consist of something more enduring in the way of residence than Mr. Ravie's fugitive appearance in Holland. In my opinion Lord Stowell's judgment amounts to no more than a declaration that if a merchant goes in person into an enemy country and superintends a mercantile transaction there he must be deemed in respect of such transaction to be saddled with all the disadvantages attaching to the character of a trader of that country. Suppose a man to have houses of business in two countries and to spend half the year in each, or to flit about between them, the court might very well declare that he had no commercial domicile anywhere, and might decline to give him the advantages attaching to such a domicile in either country, but none the less might subject him to all the inconveniences attributable to that position in both."

Judge Grain of the same court discussed the same subject in a similar sense in the case of the *Derflinger* No. 3.[1] Sir Samuel Evans in the case of the *Hypatia,*[2] discussing the character of commercial domicile, emphasized that it could not be established without sufficient proof of residence. He also raised the question whether a man might acquire a commercial domicile in more than one country. On this point he said:

[1] I Br. & Col. Pr. Cas. 643. And also in the *Rostock* (*ibid.*, 525), where he quoted with approval the judgment of the U. S. Supreme Court in *Mitchell* v. *the United States*. 21 Wall. 350. where the "approved definition" of domicile was declared to be "a residence at a particular place accompanied with positive or presumptive proof of continuing it for an unlimited time." Intent to remain there was also emphasized. Mere absence from home, however long, could not work the change, in the absence of intent. In this case a German merchant had for five years before the war carried on business at Colombo and for three years had resided there in a rented house but had returned to Germany once during the five years. The Court held that this residence was not sufficient to establish domicile and hence his goods were confiscable as enemy property. It was said that there was no evidence of an intention to abandon his German domicile and the circumstance that he did not take his wife and children with him and that he lived part of the time in a hotel strengthened the presumption.

[2] VI Lloyd 62; II Br. & Col. Pr. Cas. 377.

"It must not be taken that I am expressing any opinion as to whether a man can have a commercial domicile in two neutral countries which would entitle him to be regarded as a neutral trader in both. I can conceive that it is possible that he might establish a sufficient residence in both for the purpose. Nor am I considering the case of a corporation or an incorporated company which might theoretically have a residence in the country where it was registered. Dealing with the case now before the Court, in my view a commercial domicile such as is here claimed cannot be established without proof of a sufficient residence of the partners, or some of them, in the country where the business is carried on, or where the house of trade is situate."

The subject was considered by the Judicial Committee in the case of the *Anglo-Mexican*,[1] where Lord Parker said:

"The principles which ought to govern cases such as the present are not wholly free from doubt. It appears, however, reasonably certain that the question whether a particular individual ought to be regarded as an enemy or otherwise depends *prima facie* on his domicil, and domicil is, according to international law, a matter of inference from residence. Thus, if a neutral subject is, at the commencement of or during the war, to all appearance permanently resident in an enemy country, he will be regarded as an enemy. By taking up his permanent residence in a country other than that of his birth, he submits himself to and takes the benefit of the laws of that country; while this state of things continues, goods belonging to him are seized as prize; such goods will *prima facie* be treated as enemy goods."

Sec. 339. Necessity of Permanent Residence. Case of the "Derflinger No. 3." The first case involving a question of domicile to come before a British Prize Court during the late war was that of the *Derflinger No. 3*,[2] where the Prize Court for Egypt held that a Swiss who became a naturalized German in 1908 and was an applicant for British naturalization, had agreed in the partnership deed to reside and carry on the business abroad, had not acquired an English commercial domicile, and that his share in the goods of the partnership must be condemned. In the course of his judgment, Judge Grain said:

"Now a domicile, whether civil or commercial, implies a certain amount of permanent residence with an intention to remain; and in this case we have a man who becomes a German subject in 1908 and signs an agreement to live out of England in 1912. Does it seem probable that a man who turns himself from a Swiss into a German in 1908 has a permanent intention of becoming a resident and member of British society in 1909, especially when he can be moved off abroad or elsewhere at any time by H. E. Arnhold?"

[1] V Lloyd 112; III Br. & Col. Pr. Cas. 24.
[2] I Br. & Col. Pr. Cas. 643.

Sec. 339a. The Same. Case of the "Hypatia." In the case of the *Hypatia*,[1] a claim was put forward for the release of certain goods shipped from Buenos Aires to Hamburg before the outbreak of the war, by a firm consisting of three partners, all of whom were Germans who had been expelled from Belgium as enemy subjects after the commencement of hostilities. *Inter alia*, they claimed to have acquired a neutral commercial domicile in Argentina, although not one of the partners resided in the country. Sir Samuel Evans condemned the goods as enemy property on the ground that the claimants had not acquired a neutral commercial domicile by residence. Regarding the necessity of residence, Sir Samuel said:

"The three partners in the claimants' firm being Germans, the question arises whether they in fact or in law acquired a commercial domicil in the Argentine Republic. It is well known that, according to the English and American views of international law—although not according to the French or German or general European view—a subject of a belligerent State can have a commercial domicil in a neutral State, which would protect his property from capture at sea; but I think residence in a neutral State is an essential condition of such a domicil. I know of no case where, by mere reason of carrying on business through agents or clerks in a neutral State, subjects of an enemy can acquire a commercial domicil without residence in that State."[2]

Sec. 340. The Same. Case of the "Annaberg." On the other hand, the Prize Court for Egypt held in the case of the *Annaberg*[3] that a German subject who had for some eight or nine years before the war resided and carried on business in Australia had acquired a British commercial domicile and the fact that he had been interned by the Australian authorities did not affect his claim for the release of goods which he had shipped. The procurator for the Crown argued that since it was not clear that the claimant had lost his German domicile his goods must be condemned on the ground that the acquisition of a commercial domicile in British, allied, or neutral territory would not save them from condemnation, if his present (civil) domicile was enemy country. But Judge Cator held that the question of civil or per-

[1] VI Lloyd 62; II Br. & Col. Pr. Cas. 377.

[2] On the other hand, *enemy* commercial domicile can be acquired without residence in the enemy country, in the case of a neutral partner in a house of trade in enemy country or by carrying on business there. The *Anglo-Mexican* (V Lloyd 101). The acquisition of commercial domicile in a foreign country is of course not confined to merchants and traders. It may be equally acquired by other persons who voluntarily elect to reside in such country. *Porter v. Freudenberg*, 1 K. B. 869 (1915).

[3] II Br. & Col. Pr. Cas. 241.

sonal domicile was irrelevant and that the contention of the procurator was based upon a "confusion of ideas as to the meaning of the word domicile." [1] Even if his personal domicile were German, the judge added, that would not operate to bar his claim in a Prize Court. If it could be shown that he had a house of trade in Germany as well as in Australia he might possibly be disentitled to the benefit of British domicile, but as there was nothing to indicate that he had such a house it was not necessary to decide that point.

Likewise in the case of the *Oranje Nassau and Other Vessels*,[2] Lord Sterndale held that a German resident carrying on business in Haiti had acquired a neutral commercial domicile there and the question whether he had become naturalized in 1917 or whether he was still a German by nationality was immaterial. The converse rule laid down by the United States Supreme Court in the *Venus* in 1814 (8 Cranch 253) was restated and reaffirmed by Sir Samuel Evans in the case of the *Maningtry* [3] that "if a subject of a belligerent or a neutral had a business in hostile territory at the outbreak of the war, and resided there, he would, according to international law, have a commercial domicile there, and his goods would be subject to capture at sea after hostilities, although shipped before the war."

Sec. 341. Loss of Commercial Domicile. In the cases of the *Flamenco* and *Orduna*,[1] the question involved was whether in the circumstances an acquired neutral commercial domicile had been lost. The claimant was a German subject who carried on trade at Coquimbo, Chile, a neutral country, but who on the outbreak of war had left Chile for another neutral country and there was no evidence that his departure was merely temporary. Sir Samuel Evans held that the claimant had lost his acquired commercial domicile by leaving Chile even though he went to another neutral country. In the course of his judgment, Sir Samuel said:

"In the claim and affidavits of the bank it is stated that, 'though a German subject, he does not reside or carry on business in any enemy coun-

[1] See *supra*, Sec. 338.

[2] IX Lloyd 189; III Br. & Col. Pr. Cas. 638.

[3] IV Lloyd 202; I Br. & Col. Pr. Cas. 497. See also the case of the *Erna Woermann* (So. Afr. Pr. Court, 119), where it was held that the property of a Spanish firm commercially domiciled in Germany was condemnable as enemy property.

[4] IV Lloyd 226; I Br. & Col. Pr. Cas. 509. An interesting case decided by the English Court of Appeal, involving the question of the loss of English and resumption of German domicile was that of *Tingley v. Müller* (1917, 2 Ch. 143).

try.' That does not supply the proper test. If he had given up his trade domicile in Coquimbo, it matters not to which country he betook himself. If he had gone to the United States of America, or to Switzerland (as was suggested), he would, for the purposes of this case, be as clearly an enemy as if he had, from a sense of patriotic duty, returned to his native state. In his classical judgment in the *Indian Chief* (1800), (3 C. Rob. 12; 1 Eng P.C. 251), Lord Stowell, in discussing the national character of Mr. Johnson, who had been settled in England as American consul, said: 'Taking it to be clear that the national character of Mr. Johnson as a British merchant was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion, *bona fide,* to quit the country, *sine animo revertendi.*'"

And he concluded:

"Upon the evidence, and for want of explanations which might have been afforded if the absence of Hochschild from his business at Coquimbo were merely temporary and transitory, and had no connection with Germany or the war, I conclude that before the seizure he turned his back upon Chile and his face toward Germany; that he abandoned his adventitious commercial residence and domicile at Coquimbo, and revested himself fully in his original native garb as a German subject. I may add that if Hochschild had started for Germany, and so reverted to his original domicile, any return later during the war to resume his business in Chile would not give him again a neutral commercial character so as to separate him from that of his native country—see *per* Mr. Justice Story in the *Dos Hermanos* (1917), (2 Wheaton 76, at p. 98)."

Sec. 342. Abandonment of Commercial Domicile by Withdrawal from the Country. May a merchant of non-enemy nationality who has acquired by residence a commercial domicile in enemy country purge himself of the enemy character resulting therefrom, by withdrawing from the country within a reasonable time after the outbreak of war? Sir Samuel Evans, in the case of the *Maningtry,*[1] appears to have so believed. Referring to the dissenting opinion of Chief Justice Marshall in the case of the *Venus,*[2] he ventured to say that it might be based "on more equitable grounds [than the contrary opinion of the majority of the Court] as many writers on the law of nations have contended." In this opinion, the American Chief Justice had said: "If a British subject residing abroad for commercial purposes takes decided measures on the breaking out of

[1] IV Lloyd 202; I Br. & Col. Pr. Cas. 497. [2] 8 Cranch 253 (1814).

war for returning to his native country," etc., and "an immediate discontinuance of trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicile."

Judge Cator in the case of the *Lützow No. 4*[1] was more emphatic and expressed definitely the opinion that a person of non-enemy nationality commercially domiciled in enemy country might purge himself by withdrawal upon the outbreak of war. The South African Prize Court apparently took the same view of the matter when it said that under the rules of international law the goods of a Spanish firm commercially domiciled in Germany would be liable to condemnation "unless it be shown that the members of the firm had taken proper steps to quit the enemy country *sine animo revertendi*."[2]

The Judicial Committee in the case of the *Anglo-Mexican*,[3] without deciding the point definitely, apparently sympathized with the view of Chief Justice Marshall in the *Venus* and with the opinions of Sir Samuel Evans and Judge Cator. On this point, Lord Parker said:

> "An acquired domicil may be abandoned, and if, prior to the actual capture, the owner has already done some unequivocal act indicating an abandonment of his acquired domicil in the country of the enemy, the goods will *prima facie* be treated as belonging to a neutral. It has been sometimes urged that neutrals resident in a country which by the outbreak of hostilities becomes an enemy country ought to be allowed a reasonable time after such outbreak to elect whether they will abandon or retain their acquired domicil. This point was much discussed in the *Venus* (1814), (8 Cranch (Amer.) 253). In that case the majority of the judges of the Supreme Court of the United States decided against allowing any interval for election. It was not, they thought, desirable that a neutral, after the outbreak of hostilities, should be able for any interval, however short, to sit, as it were, on the fence ready to come down on either side according as it might prove to his advantage. The English authorities are not conclusive one way or the other. The point does not, however, fall to be determined on this appeal, for the respondent was not at the outbreak of hostilities permanently resident in Germany. His domicil was in the United States."

In the case of the *Kara Deniz*,[4] however, the Privy Council appears to have definitely approved the doctrine of the right of withdrawal. In this case it affirmed the decision of the Prize

[1] II Br. & Col. Pr. Cas. 122.
[2] The *Erna Woermann*, Cases decided in the Prize Courts of South Africa, 119.
[3] V Lloyd 109; III Br. & Col. Pr. Cas. 27.
[4] X Lloyd 358.

Court of Bombay confiscating the goods of a naturalized Persian domiciled at Constantinople on the ground that he had not discharged the burden of proof to satisfy the Court that he had abandoned his Turkish commercial domicile upon the outbreak of the war. Every act of the claimant, it was asserted, showed his intention to retain his commercial domicile. The conclusion to be drawn from the decision was that if the claimant had discharged the burden of proof regarding the abandonment of his acquired enemy domicile he would have been divested of his enemy character and his goods would have been released.

Sec. 343. Acquisition of Commercial Domicile through House of Trade. As already stated, commercial domicile in non-enemy country may be acquired not only by personal residence but also through the possession in such country of a house of trade or as a result of connection with such a house. On this point, Sir Samuel Evans said in the case of the *Maningtry:* [1]

"Apart from a commercial domicile by residence, the property of a person may acquire a hostile character independently of his national character or his personal residence. If a person be a partner in a house of trade in an enemy's country, he is, as to the concerns and trade of that house, deemed an enemy (Pratt's Ed. of Story, p. 60). And the property of the house of trade established in an enemy country is considered liable to capture and condemnation as prize.—*Wheaton's International Law,* 334.

"The rule is succinctly stated by Mr. Justice Story in the *Freundschaft* (1819), (4 Wheaton, at p. 107): 'It has been long since decided in the courts of admiralty, that the property of a house of trade established in the enemy's country is condemnable, as prize, whatever may be the domicile of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicile of any of the company."

So Lord Parker observed in the case of the *Anglo-Mexican* [2] that

"it seems that a neutral, wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly viewed as enemy in respect to his property or interest in such business. He acquires by virtue of the business a commercial domicile in the country in or from which the business is carried on, and this commercial domicile, although it does not affect his property generally, will affect the assets of the business house, or his interests therein, with an enemy character."

[1] IV Lloyd 202. [2] V Lloyd 109.

Sec. 344. Lack of Reciprocity in the Anglo-American Rule. But while a non-enemy person (national, neutral, or allied) may acquire a commercial domicile in enemy country by being a partner of a house of trade in such country or by carrying on business therein and thereby lose his non-enemy character in respect to the goods or trade of such house, a person of enemy nationality who has a house of trade in a neutral country does not thereby acquire a commercial domicile in such country which would divest him of his enemy character in respect to the goods or trade of such house. He might acquire a commercial domicile there by residence which would protect his goods from capture, but the mere possession of a house of trade there without abandonment of his residence in enemy country would not protect the trade of his house from capture. This distinction and the legal effect was emphasized by Judge Cator in the case of the *Annaberg*,[1] where he said:

"A clear distinction is to be drawn between the enemy merchant who resides and does business in his own country, but at the same time has a house of trade in a foreign land, and his fellow citizen who, without intending to change his nationality or his civil domicile, settles in the same foreign country and trades there in person. The latter acquires a trade domicile; the former does not. The distinction is of capital importance in prize law, for in the former case the goods of the enemy merchant, even though they appertain only to his foreign house, are subject to condemnation, whereas those belonging to the enemy merchant actually residing in the same country will be restored. The reason for the distinction may be that in the one case the profits of the business will probably be remitted out of the country, whereas in the other they are likely to be spent locally. But whatever the reason, the rule seems to be well established.

"The case of the *Harmony* (2 C. Rob. 322; 1 Eng. P. C. 241) illustrates the distinction. That was the converse of the present case. Mr. Murray endeavored to shew that he had acted in France merely as agent for his neutral firm in America so as to give a neutral complexion to his acts of trade. He lost his case, and, mainly by reason of prolonged residence, was held to have acquired the character of a 'resident trader of France,' and not to be merely a neutral trader 'in' France, or, in other words, was held to have acquired a French commercial domicile."

This lack of reciprocity between the treatment of a neutral having or participating in a house of trade in enemy country, and an enemy having a house in a neutral country or connections therewith has not escaped the criticism of jurists. Sir Samuel Evans in the case of the *Clan Grant*[2] observed that

[1] See also Secs. 338, *supra*, and 344, *infra*.
[2] 1 Lloyd 398; 1 Br. & Col. Pr. Cas. 272.

"Every one knows that if a person carries on business in the enemy's country he has his commercial domicile there; but the converse of the rule is not extended to the case of a person in a hostile country having a share in the house of trade in a neutral country. The position is dealt with by Mr. Wheaton, who refers to the authorities which have been cited to-day by counsel for the Crown, in a note which reads as follows (p. 335 *Wheaton's International Law* (8th ed. by Dana, 1866)): 'The converse of this rule of the British Prize Courts, which has also been adopted by those of America, is not extended to the case of a merchant residing in a hostile country, and having a share in a house of trade in a neutral country. Residence in a neutral country will not protect his share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country.' Then Mr. Wheaton criticises that in this way: 'It is impossible not to see, in this want of reciprocity, strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions.' He of course does not say that that is not the law, but he is criticising what he deems to be the partiality of it.

"It is interesting to see a note by Mr. Dana, whose edition of Wheaton is well known, in which he disagrees with his author, and in which he says this: 'But there seems to be no sound reason for demanding the application to these cases of what is called reciprocity. Reciprocity implies two parties, who make some equitable exchange or offset of rights or benefits yielded or enjoyed. The cases stated in the text are rather those of two positions of a third party, each having an element of hostile connection, presented conversely. In the one case, a stranger to the belligerent is a neutral, as far as his personal domicil is concerned, but has an active commercial interest involved with the enemy's interests, and subject to the enemy's control and taxation. In the other his special commercial interest referred to is neutral, as far as its locality is concerned; but, by reason of his personal domicil, he is himself subject to the enemy's control, and liable to compulsory service, and to unlimited taxation and forced contributions, which may reach and include the profits of his commercial house in the neutral country. The decisions of the one case in the affirmative carries with it no argument that the other should be decided in the negative. The two cases are independent. The question in each is, whether the element of hostile connection or control which it presents is sufficient to warrant a belligerent in taking the property *jure belli*.'"

In this case Sir Samuel condemned two thirds of a cargo and released the other one third, belonging to a partnership firm whose commercial domicile was in a neutral country and composed of three German partners, two of whom resided at Hamburg and the other at Khartoum. Regarding the goods attributable to the two enemy partners domiciled in enemy country, he said it was quite clear that the mere fact that they had a house of trade in a neutral country did not affect them and it

would be the same if the house of trade were in British territory. He concluded that it was unnecessary for him to discuss the question as to whether there ought to be reciprocity in the two cases. It was clear that as the law stood the property of the two partners who resided at Hamburg was confiscable.

Sec. 345. Attribution of Property as Between Neutral House and Enemy Branch. In some cases the Prize Court was called upon to decide whether the goods seized and claimed for condemnation should be attributed to the branch house in enemy country or to the neutral house. Such a case was that of the *Lützow* Nos. 4 and 5,[1] which involved the ownership and liability to capture of goods bought in Germany by the Hamburg branch of an American incorporated company, on orders given by Japanese branches of the company, shipped before the war on a German vessel and destined to the Japanese branches. The company claimed the release of the goods, among other reasons, on the ground that the Hamburg branch was merely a "buying agent" for the American company or its Japanese house, to whom the goods properly belonged. The Prize Court for Egypt held, however, that the branch house of a company is on the same footing as any other commercial house, that in respect of the business a company transacts abroad each of its branches is a "separate entity" as a house of trade; and that at the material time the goods in this case were the property of or attributable to the Hamburg branch, and as such were *prima facie* liable to condemnation as enemy goods. But on appeal to the Judicial Committee, the decision was reversed.[2] The foreign branches of the American company were, it was said by the Judicial Committee, not incorporated separately and were "in no way separate firms or entities." They were merely places where the business of the company was carried on by employees of the company. The branches kept separate accounts as a matter of bookkeeping but all profits earned anywhere were for the account of the company and all property belonged to it. The property here claimed was not and never had been that of the Hamburg branch as such, and even if it were a "separate entity," it was by no means clear under the circumstances that the goods belonged to it. Sir Arthur Channell, speaking for the Judicial Committee, thus concluded:

[1] II Br. & Col. Pr. Cas. 122, 435.
[2] VI Lloyd 289; III Br. & Col. Pr. Cas. 37.

"The fact that the goods were on a German ship undoubtedly raises a presumption against the claimants, but the claimants have shown clearly that the real and true ownership of these goods was neutral. In their Lordships' opinion the dealings with the goods seized on the *Lützow* by the appellants and their branches were *bona fide* from the beginning to the end, and the only British complaint against them is want of promptness in closing their trade in Germany. The rule as to concerns of a foreign trade is somewhat vague, but a careful examination of the dealings with these particular goods does not seem to bring them within the fair meaning of the expressions used, or to make the ownership of them liable to be treated as German by reason of the appellants continuing some trade in Germany after the war had begun. If any nationality other than its own were to be attributed to the appellant company as owner of these goods, it would be a Japanese nationality rather than a German. They were more the concerns of the Japanese than of the German branch, and the transaction had really originated in Japan, although the title to the goods had originated in Germany."

Sec. 346. Effect of Withdrawal from House of Trade in Enemy Country. As pointed out above, a person of non-enemy nationality who has acquired a commercial domicile in enemy country through residence therein, may by leaving the country upon the outbreak of war, purge himself of the enemy character thus acquired. May such a person who has acquired a commercial domicile in enemy country through the possession of or interest in a house of trade therein equally divest himself of the enemy character attaching in consequence of such interest or ownership, and save from capture the goods attributable to such house, by severing his connection therewith upon the outbreak of war? The British Prize Courts discussed this question in several cases but did not always make it clear whether the right, admitted in the case of neutral persons possessing or having an interest in such houses, belonged equally to British or allied subjects. Thus Sir Samuel Evans, in the case of the *Manningtry*, adverting to the settled rule that the property of a house of trade established in enemy country is condemnable even though the partners are domiciled in neutral territory, added:

"But it seems also to be settled that in such cases confiscation will not take place at the commencement of war if the trade has been carried on during peace, unless the person affected continues his connection with the trade after the war.—*Pratt's Ed. of Story*, p. 61; *Calvo*, Sec. 1936; *The Vigilantia* (1798), (1 C. Rob. 1, at p. 15), and *The San Jose Indiano* (2 Gall. 267, at p. 288).

"It is not easy to see why, in the case of a partner in a hostile house of trade, time should be given to sever connection after war before

confiscation by capture at sea is permitted, when no such opportunity is given to a person having a commercial domicile by residence in hostile territory. But I accept the law as it stands. And, indeed, it may be that the dissenting judgment of Chief Justice Marshall in *The Venus* (8 Cranch, at p. 288) is based on the more equitable ground, as many writers on the law of nations have contended."

Sec. 347. Right and Duty of Subject to Sever Connection with House in Enemy Country. Referring later to the dissenting opinion of Chief Justice Marshall in the *Venus*, where the Chief Justice said: "If a British subject residing abroad for commercial purposes takes decided measures, *on the breaking out of war*, for returning to his native country," etc., and to the opinion of Calvo regarding the duty of a merchant domiciled in a neutral country to sever his connection with an enemy house, Sir Samuel Evans added that "if it were obligatory upon a neutral to take such immediate steps it is none the less obligatory upon the subject of a belligerent," [1] and that it was "incumbent on the person who has to sever his connection in this way to show clearly by satisfactory proof that he took steps to do so, just as it rests upon a resident in hostile territory to prove that he was not there *animo manendi*."

The view here apparently approved by Sir Samuel Evans that a person of non-enemy nationality having a house of trade in enemy country is entitled to close his business and take such steps as may be necessary to purge himself of the enemy character resulting from his connection with such house was definitely approved by Judge Cator in the case of the *Lützow* No. 4.[2]

Here a claim was put forward by an American company for the release of goods bought by a branch in Hamburg and transmitted to another branch at Kobe, Japan. *Inter alia*, the claimants contended that upon the outbreak of war they at once took steps to close the German branch, engaged in no further business in Germany, and remained there only long enough to wind up its affairs. Regarding the consideration which should be shown to a claimant who had thus conducted himself, Judge Cator said:

"There has been great discussion as to what indulgence, if any, should be shewn to a non-enemy who breaks his connection with the hostile country on the outbreak of war. That some indulgence was due to him was I think conceded in theory from a very early date, but the

[1] The claimants here were British partners, domiciled in England, in a house of trade in Germany.
[2] II Br. & Col. Pr. Cas. 122.

question was complicated by the fact that the theory appeared to conflict with the strict rule which forbids a British subject to trade with the enemy, and, as a consequence of this conflict, an idea seems to prevail that the rule may be invoked for the benefit of neutrals but not for that of British subjects.

"I have come to the conclusion that this idea is erroneous, and that whatever may in practice have been the hardship to individuals no such distinction has ever been formulated by the Prize Court. That a great distinction between neutrals and the subjects of a belligerent Power in regard to matters of trade does in fact exist cannot be gainsaid. For a neutral who has no house of business in the hostile territory is at perfect liberty to trade with the enemy provided he does not contravene the rules about contraband and blockade, whereas a British subject is prohibited by the laws of his country from holding any intercourse whatever with the enemy except under special licence from the Crown and at times the rules respecting non-intercourse have been pressed with astonishing severity against British subjects.

"But whatever may have been the case in earlier days, I think from the time that Sir W. Scott first presided over the Prize Court it came to be recognised that on the outbreak of war a non-enemy should have some opportunity in which to remove himself and his property from the enemy country if he wished to do so, and I cannot find that Sir William ever formally distinguished between cases of neutrals and of British subjects, or between houses with branches in the enemy country and individuals who only had partnerships in such houses, or even, on the actual outbreak of war, between persons who were in the enemy country at the time of the seizure of their goods or were not, although at any other period this circumstance was undoubtedly treated as a deciding factor."

Adverting to the contrary view expressed by the Supreme Court of the United States in the case of the *Venus*, "which was a majority judgment only," Judge Cator continued:

"But I think this part of the judgment is based upon a false premise. The doctrine, says the judgment, is founded 'upon a presumption that the person will certainly remove before it can possibly be known whether he may elect to do so or not.' But for such a proposition I see no warrant. A declaration of war would raise no presumption at all. If the person takes no step to the contrary his acquired domicile remains. All that is asked for him is a short period within which, if it so please him, he may take the necessary steps to renounce his domicile, coupled with a right to withdraw his property from the enemy country, a right which implies a protection of his goods not from danger of seizure but from condemnation by a Prize Court. From the nature of the case, by the time it comes to trial his election will have been made. I cannot admit that this doctrine is unfounded in law, for I think it has been accepted by the English Prize Court, and it certainly appears in my eyes to be based on reason and justice. Moreover, it is to be remembered that this was only the judgment of a majority of the Court. There were two dissentients, of whom one was Chief Justice Marshall, and a view of the

law supported by the opinion of that great judge is entitled to profound respect."

And, finally, referring to the old rules of prize law, he asked "who would maintain that it is less reasonable to permit an election at the present time than in the days of our forefathers?" "The whole tendency of the past fifty years," he said, "has been toward a relaxation of the severity of the laws of war. Even those who scoff at idealists dreaming of its abolition have concurred in seeking to rob it of some of its horrors to individuals. And even if our enemies have not acted up to their professions there is no reason for us to follow their example." And he concluded:

"But I am glad to think that the old rule, as I read it, expounded by Lord Stowell himself, is sufficient to protect all individuals who may have been overtaken by the hurricane of war. No one can wish to inflict needless hardship on British subjects or on neutrals, and if on the outbreak of war a non-enemy, be he neutral or British, resident or non-resident, promptly closes his business and merely takes the steps necessary to remove his own property from the enemy country, I think he is entitled to do so. He gives no aid to the enemy by his action, but rather the reverse, and I think he should receive every consideration from the Court provided no attempt be made by a British subject to evade the rule against illicit trading with the enemy. But naturally the burden of proof must rest on the shoulders of the claimant, and until he discharges that burden his goods will be in jeopardy."

The Judicial Committee in the cases of the *Anglo-Mexican* and the *Lützow No. 5,* while definitely affirming the right of a *neutral* partner in a house established in enemy country to discontinue or disassociate himself from its business within a reasonable period after the outbreak of war and thereby save his goods from capture, did not pronounce an opinion on the question whether a *British* or *allied* subject could equally protect his goods from capture by this procedure.

Sec. 348. Acquisition of Commercial Domicile in Oriental Countries. There is one exception to the settled rule of English law governing the acquisition of civil and commercial domicile in foreign countries, namely, that it cannot be acquired for war purposes in countries where the system of extra-territorial jurisdiction prevails. This question came before the Prize Court for Egypt in March, 1916, in the case of the *Derflinger No. 1,*[1] in which a claim was made for the release of certain goods

[1] I Br. & Col. Pr. Cas. 386.

consigned by a German subject domiciled in China, to himself in Germany for his private use. He was not a merchant but a private resident and being domiciled in a neutral country he invoked the benefit of the rule which protected such shipments from confiscation and which, as we have seen, had been accorded to a German subject domiciled in Australia.[1] The Prize Court held, however, that he could not acquire a domicile in China and hence his goods must be condemned as those of an enemy subject. Judge Cator, reviewing at length the jurisprudence and practice regarding the status of Europeans in Oriental countries, said:

"The much-quoted case of the *Indian Chief* (1800), (3 C. Rob. 12; 1 Eng. P. C. 251), decided by Lord Stowell, is directly in point. We are concerned only with the second part of the judgment—a part which unfortunately has not found a place in the *English Prize Cases*. The question turned upon the position of Europeans in Oriental countries, and on this subject Lord Stowell says, 'In the East, from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were—*Doris amara suam non intermiscuit undam;* not acquiring any national character under the general sovereignty of the country, and not trading under any recognised authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade' (3 C. Rob., at p. 29).

"In those days factories, as they were called, still flourished in the Orient. A factory was a community of Europeans established in a foreign country for the purpose of trade, yet owing no allegiance to the ruler of the soil and not much controlled by any other. Although grouped under the protection of one flag, its members might consist of traders belonging to different nations. An Englishman, for instance, might attach himself to a Dutch factory, and if he did so his trade domicile would for the purpose of a British Prize Court be reckoned Dutch. Since that time the grouping has undergone a change. Communities which in those days were not trading under any recognised authority of their original country have now sorted themselves out into communities of different nations, definitely controlled by their home Governments, which legislate for them in virtue of rights acquired by custom or definitely conceded by native potentates. The trading bond has given way to one of nationality. But allowing for this difference, the words of Lord Stowell are just as applicable in these days as they were more than a hundred years ago. The waters of Alpheus still flow undefiled, and where European Powers enjoy the privilege of ex-territorial jurisdiction their subjects never lose their native character. Each community continues its distinctive existence, governed by its own consuls and subject to the laws of its mother country.

[1] See the case of the *Annaberg*, *supra*, Secs. 338 and 344.

"Such is the case in China, and such it is here. It is a system with which we in this quarter of the world are quite familiar, for the British Courts in the Ottoman dominions and Egypt exist solely by virtue of His Majesty's ex-territorial jurisdiction in those countries. Our position is assimilated as nearly as may be to a Crown colony, and in places where the Crown has enjoyed ex-territorial power, and subsequently acquires territorial dominion, the transition to the status of a Crown colony can be effected almost insensibly, as I can personally testify from my observation of various phases in that process which have taken place in Zanzibar and East Africa. From time to time questions as to the status of British subjects in China and the Ottoman Dominions have come before our courts, and it has been settled that no British subject can change his legal domicile, by residence in any place where the Crown has ex-territorial authority. That, as we know to our cost, owing to the great inconvenience which it has entailed upon the British community, is, I think, the effect of *In re Tootal's Trusts* (1882), (52 L. J. Ch. 664; 23 Ch. D. 532), approved of by the Privy Council in *Abd-ul-Messih* v. *Farra* (1887) (57 L. J. P. C. 88; 13 App. Cas. 431). These decisions, it is true, relate only to the subtle and artificial doctrine of personal domicile which has been evolved by our civil courts for the purpose of determining questions relating principally to probate and administration; and a legal domicile for the purpose of a court of probate is, I need hardly say, a very different thing from a commercial domicile for the purpose of a Prize Court. But *In re Tootal's Trusts* emphasizes the fact that there still exist countries where, owing to fundamental differences in race and religion, Europeans do not merge in the general life of the native inhabitants, but keep themselves apart in separate communities; and where such separation is sanctioned by the exercise of ex-territorial authority I am of opinion that it is impossible for any individual to acquire a trade domicile other than that of the country to which he owes allegiance.

"Mr. Wolf is a German subject and a member of the German community in Shanghai, and his domicile for the purpose of these proceedings must be taken to be German. His goods form part of the cargo of an enemy ship which has been confiscated to the Crown, and they must be condemned in like manner."

In the similar cases of the *Lützow* and *Koerber*,[1] decided by the Prize Court for Egypt, the claimants argued that even if it were impossible to acquire a "civil" domicile in China, it was nevertheless possible to acquire a "commercial" domicile; that there was a difference between the two; that the essential element in commercial domicile is an *animo removendi*—the intent to abandon a former domicile for a new one—and does not depend on nationality nor even upon the real domicile, but on the place in which the business is carried on; whereas, on the contrary, "civil" domicile is a question of origin and nationality. This point as to the difference between the kinds of domicile

[1] I Br. & Col. Pr. Cas. 528.

had not been argued or passed upon by the Court in the case of the *Derflinger No. 1.* Although the supreme court of Maine in the case of *Mathew* v. *Cunningham* (1909),[1] had held that domicile might be acquired by an American citizen through residence in China, the Prize Court for Egypt took a different view of the matter. In the course of his judgment, Judge Grain said:

"To take Dicey's definition of commercial domicile, can it be said that a person who pays no taxes to the country in which he is living, is more or less beyond the civil control of the country, whose conduct is regulated by his own judicial courts, who only pays such duty on imports and exports as have been arranged by treaty with his own State, and who in some extraterritorial countries cannot own the smallest parcel of land—can it be said that he is a person 'whose trade or business contributes to or forms part of the resources of such country and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country'?"

And he concluded:

"Although I have been much impressed by the judgment in *Mathew v. Cunningham* and the review of the British cases in that judgment, nevertheless I am of opinion that at the present time the British law is that neither a civil nor a commercial domicile can be established by an individual who is resident or carrying on business in a foreign land when his country has been granted the privileges of extra-territoriality."

In the case of the *Eumaeus*,[2] Sir Samuel Evans held that a firm consisting of two British and two German subjects, neither of whom resided at Shanghai, carrying on business at Shanghai where it was registered at the German consulate as a German firm must be treated as a German firm for all purposes of trade. None of the partners, it was held, had acquired or could acquire under the circumstances a commercial domicile in China because of the system of extra-territorial jurisdiction prevailing there. The shares in the goods attributable to the German partners were therefore condemned; as regards those of the British partners the case was adjourned for further evidence as to what measures, if any, had been taken by them to sever their connection with the firm on the outbreak of the war. Adverting to the system of extra-territoriality in China, Sir Samuel said the effect was that "not only are the respective European communities governed by their own national laws among themselves, but that the Chinese authorities are precluded from exercising any

[1] 74 *Atl. Rep.* 809.

[2] IV Lloyd 270; I Br. & Col. Pr. Cas. 605.

authority in any disputes between the subjects or citizens of the European states respectively, and other foreigners." Sir Samuel was not called upon in this case to express an opinion upon the question whether at the present day a British subject could acquire a "civil" domicile in an Oriental country like China, since none of the partners claimed to have acquired it. The decision in *Tootal's Trusts* (1883) that it could not be acquired might or might not, he said, be good law and he pointed out that it had been dissented from by the supreme court of Maine. Nor was it necessary to pronounce upon the question whether for purposes of prize law a "commercial" domicile might be acquired by Europeans in Oriental countries. That, he thought, must be dependent upon circumstances. "For instance," he said, "it is difficult to find any good reason why a British subject might not have a commercial domicile in a country like Japan where consular jurisdiction and extra-territorial privileges have been abolished for some years."

The Judicial Committee of the Privy Council does not appear to have pronounced an opinion on the question of the acquisition by Europeans of domicile, civil or commercial, in Oriental countries.[1] Likewise decisions of the Prize Courts of other countries than Great Britain seem to be lacking.

[1] But the House of Lords held in 1918 in the case of *Casdagli* v. *Casdagli* (L. R., 1919, A. C., 145), that a British subject might acquire through residence a "civil" domicile in Egypt. The decisions of the Prize Courts referred to above were made before the decision of the House of Lords in the *Casdagli* case. It is possible that if the question of the acquisition of "commercial" domicile in Oriental countries had come before the Prize Courts subsequent to the decision of the House of Lords they would have reached a different conclusion. There would seem to be no logical reason why commercial domicile cannot be acquired in a country where the system of extra-territorial jurisdiction prevails. Compare the criticisms of Evans in his *Cases on International Law*, pp. 433-4, and Huberich in the *Law Quarterly Review*, 1915, p. 447.

CHAPTER XII

PASSING OF PROPERTY

I

Ante-Bellum Contracts and Shipments

Sec. 349. Preliminary Observations. The question which the Prize Courts were most frequently called upon to decide in connection with the liability of goods to condemnation was whether the ownership had legally passed to the claimant at the time of capture. The determination of the question frequently involved an interpretation of particular kinds of contracts employed in maritime transactions such as those containing f.o.b. (free on board) and c.i.f. (carriage, insurance, freight) clauses, clauses containing the words "documents against acceptance," "no arrival, no sale," etc.; whether the sellers intended to reserve the right of disposal of the goods (*jus disponendi*); the legal import of bills of lading; who had the ownership in the case of shipments to or by enemy branch houses or selling agencies in neutral territory; the effect of the domicile of the claimant in neutral territory; and whether the rights of mortgagees, pledgees and lien holders of enemy goods were rights of property. The determination of these questions was often admittedly very difficult in view of the complex and involved nature of the transactions. The decisions of the British Prize Courts were by far the most numerous and it was they which discussed with the greatest fullness the questions of law involved and which laid down in the clearest terms the principles upon which the decisions were reached.

Sec. 350. Distinction Between Ante-Bellum and Post-Bellum Transactions. The British Prize Courts, in particular, attached great importance to the distinction between contracts and shipments made in good faith prior to the outbreak of war, especially when war was not yet anticipated by the parties, and those made after the outbreak of war or at a time when war

was imminent or expected. In the former case in determining the question as to who was the owner of goods at the time of capture they applied generally the rules of municipal law, that is, the rules of the English civil or commercial law. On the other hand, in determining the fact of ownership in the case of contracts or shipments made during the war or when war was already imminent and expected, they applied the more rigorous rules of prize law and not those of municipal law, and refused to recognize the validity of transfers of property from enemy to non-enemy persons which if the rules of municipal law had been applied would have been valid transfers.[1] Likewise, they held that, according to the principles of prize law, a non-enemy owner who during the war shipped goods to an enemy country could not be regarded as retaining the *jus disponendi,* and therefore the ownership, and hence goods so shipped must be regarded as enemy goods when captured. This rigorous interpretation was almost exclusively English.

Sec. 351. The Risk Test. The *Jus Disponendi.* Case of the "Miramichi." The question of the passing of property in consequence of shipping contracts made before the outbreak of war first came before the British Prize Court in the case of the *Miramichi,* November, 1914.[2] Briefly, the facts were the following: In July, 1914, before war was imminent, an American firm made a c.i.f. contract for the sale of wheat to a German firm. The wheat was shipped on the *Miramichi,* a British vessel, and was destined to the port of Rotterdam. During the course of the voyage war broke out and, in consequence, the buyers became enemies of Great Britain. The sellers' bankers, a neutral company, had discounted the bill of exchange drawn by the sellers on the buyers and had forwarded it together with the bill of lading and other documents to a bank in Germany for tender of the latter documents against acceptance of the bill of exchange. The cargo being seized as prize by the British, the German buyers refused to take up the documents, whereupon the neutral sellers claimed the wheat as their property. The Attorney-General asked for condemnation on the ground that the test of liability to condemnation was whether the enemy or the neutral would suffer the loss if the wheat was condemned, that is, it depended on the answer to the question upon whom was the risk at the moment of capture. In this case, since the sellers had a

[1] See the case of the *Posterior and Other Vessels,* VII Lloyd 21; III Br. & Col. Pr. Cas. 275.
[2] I Lloyd 157; I Br. & Col. Pr. Cas. 137.

right of payment against the buyers and only a *jus disponendi* as holders of a bill of lading not endorsed to them, they could not, he contended, be regarded as having a "general property" in the cargo and still less the risk.[1]

Sir Samuel Evans held, first, that since all the material parts of the business transaction in this case took place *bona fide* during peace the law to be applied in determining who were the owners at the time of capture was the "ordinary municipal law governing contracts for the sale and purchase of goods." In the second place, he held that in a case like this where the goods were contracted to be sold and were shipped during peace when war was not imminent and were captured afloat after war had supervened it was, he thought, a "cardinal principle" that they were not subject to condemnation unless under the contract the property in the goods had passed at the time of capture, to the enemy buyer. The element of risk was not the determining factor of ownership; it was rather the intention of the parties which was decisive. Finally, in the present case the sellers having reserved the *jus disponendi* over the goods, he held that the property remained in them and would have so remained until the shipping documents were tendered to be accepted by the buyers and the bill of exchange for the price was paid. The property had not therefore passed to the enemy buyers at the time of capture and accordingly the goods must be restored to the claimants.

Sec. 352. The Same. Case of the "Parchim." In the case of the *Parchim*,[2] a German firm of Hamburg and Valparaiso had in July, 1914, contracted to sell a Dutch company a cargo of nitrate which was shipped on a Russian vessel destined to a Dutch port. During the course of the voyage war broke out and the cargo was seized by the British (December 6). The bills of lading in triplicate were made out to the order of the Valparaiso branch of the German firm, were endorsed by it in blank and sent to the buyers. The latter deposited the full invoice price with the sellers' bankers about December 9, with instructions not to part with the money until the bills of lading arrived. The third set only arrived the latter part of January and they were not handed to the buyers against release of the deposited price until after that date. On these facts Sir Samuel Evans held that the sellers having reserved the right of disposal of the goods did not

[1] See also as to this *supra*, Secs. 330, 331.
[2] IV Lloyd 375; I Br. & Col. Pr. Cas. 579. See also Sec. 352, *supra*.

part unconditionally with their property in them, and that, in consequence, the property had not passed to the neutral buyers at the time of shipment and could not pass while they were *in transitu* so as to defeat the right of belligerents. They were accordingly condemned as enemy goods. Upon appeal to the Privy Council,[1] the Judicial Committee approved the view of Sir Samuel and reaffirmed its own opinion in the case of the *Odessa* that the proper test of the liability of goods to capture was ownership and not risk and also his view that in the case of ante-bellum contracts and shipments, such as this, the law to be applied in determining the fact of ownership was the municipal law of England governing the transfer of property (particularly the Sale of Goods Act, 1893), which law, it was declared, was based on "mercantile usages common to all nations." Lord Parker added that if the parties contracted with reference to a foreign municipal law which was proved to differ in any material respect from English law, this fact would be taken into consideration in determining their intention with regard to the passing of the property. But, having regard to the presumption that the general law of a foreign country is the same as English law, the mere fact that the contract was entered into with reference to the law of another country was immaterial. The Judicial Committee, however, disagreed with Sir Samuel in regard to the intention of the parties and overruled him on this point and released the goods to the neutral claimants. Their Lordships admitted that it was a "nice point" on which opinions might easily differ, as was shown by the case of the *Sörfareren*,[2] where Sir Samuel had himself come to a different conclusion on a contract which appeared quite as favorable to the sellers as did the contract in the present case. They thought the learned President of the Prize Court had not in the present case given as much effect as he should have done to the fact that the contract was for the sale of the entire cargo of a named ship and that it was clearly at the risk of the buyers from a time anterior to the capture. It was their opinion that, considering all the facts, it was the intention of the parties that the property should pass to the buyers at the date of shipment, but that the latter were not intended to have possession of the cargo or bills of lading until actual payment of the purchase price. Evidently the intention of the parties was the dominating consideration with

[1] IV, *ibid.*, 370; II, *ibid.*, 489.
[2] IV Lloyd 196; I Br. & Col. Pr. Cas. 589.

the British Prize Courts and the discovery of this intention was frequently their chief task.

Sec. 353. The Same. Case of the "Derflinger No. 2." The case of the *Derflinger No. 2* [1] involved the status of goods sold by a German firm before the outbreak of war to an Italian company c.i.f. Genoa, shipped on a German vessel, the bills of lading being made out to the order of the sellers and forwarded by them to their branch house at Manila. Subsequent to the outbreak of the war the ship and goods were seized by the British, after which date the bills of lading were delivered by the sellers to the buyers against acceptance of a draft for the price of the goods. At the hearing before the Prize Court the claimants contended that in deciding the question of ownership the Prize Court should be guided by Italian law as to the passing of property from sellers to buyers and that by Italian law the goods in this case passed to the buyers at the time they were laden on the ship. The Prize Court for Egypt held and the decision was affirmed by the Judicial Committee [2] that there was no essential difference between Italian and English law on this point and that in either case regard must be had to the intention of the parties. In the present case it was held not to have been the intention of the parties that the property should pass at the time the goods were placed on board and that therefore they must be condemned as enemy goods. The basis for this conclusion was the intention of the parties to the contract that the property should not pass to the buyers until the draft held by the bank on behalf of the Manila branch house had been accepted. Not having been so accepted at the date of seizure the ownership of the goods remained in the enemy sellers.

Sec. 354. The Same. The "Marquis Bacquehem No. 2." The principle of law and the elements to be taken into consideration in ascertaining the intention of the parties was thus stated by Judge Cator of the Prize Court for Egypt, in the case of the *Marquis Bacquehem No. 2:* [3]

"By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 17, in 'a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred,' and to ascertain the intention of the parties it is necessary to regard: (a) the terms of the contract, (b) the conduct of the parties, and (c) the circumstances of the case.

[1] I Br. & Col. Pr. Cas. 398.
[2] VII Lloyd 394.
[3] Br. & Col. Pr. Cas. 96.

"Now, what were the intentions of the parties to this contract? First, as to the terms of the contract: The sellers state that they reserve all rights, and the terms of the contract give only a certain period in which the buyers can take delivery of the cotton. As regards the conduct of the parties: The sellers retain in their possession the bills of lading. The conditions of sale certainly proceed to say that the buyers have to refund these amounts, but that is at a later stage. It therefore appears that as regards the conduct of the sellers up to this point that they have done everything possible to keep this cargo under their own name and to reserve the property in it to themselves."

Sec. 355. The Same. The "Prinz Adalbert." In the case of the *Prinz Adalbert (Part Cargo)*,[1] the question at issue was the ownership of certain goods laden on a German vessel in July, 1914, and consigned by neutral shippers (an American firm) to a German company which was alleged to be merely the shipping agents of the American company. The bills of lading made the goods deliverable to the shippers' orders at Hamburg and were endorsed in blank. They were attached to drafts drawn by the shippers on the German company and were discounted in the United States. Both drafts were accepted by the German company, one on August 1, before the outbreak of war, the other on August 10, after war was declared and the bills of lading were delivered to the German company simultaneously. The ship was seized on August 5 and the writ claiming condemnation of the ship and cargo was issued on August 18th. The goods being claimed by the shippers as neutral property, Sir Samuel Evans held that whether the German company were mere selling agents for the American company or not, the goods passed to them at the date of shipment and must therefore be condemned. The circumstances, he thought, showed that the German company were the buyers and that they had the dominion over the goods immediately they were shipped, since they had paid for them—at any rate to the extent of 75 per cent. He added that it was never intended that the American company should have any power of disposal over the goods after they were shipped. But upon appeal the Judicial Committee overruled the President of the Prize Court and held that the property did not pass to the buyers at the date of shipment but remained in the shippers until the German company accepted the drafts.[2] Nevertheless the decree of the Prize Court was affirmed on the ground that the claimants were not the owners at the date of the com-

[1] V Lloyd 1; I Br. & Col. Pr. Cas. 70.
[2] V, *ibid.*, 11; III, *ibid.*, 1.

mencement of the prize proceedings on August 18th. Discussing the rôle of the bill of lading in such cases, Lord Sumner said:

"By general mercantile understanding, which has the force of law, where transactions originate like the present in time of peace, without prospect of war, the delivery of an endorsed bill of lading, made out to the shipper's order, while the goods are afloat, is equivalent to delivery of the goods themselves, and is effectual to transfer ownership if made with that intention. The bill of lading is the symbol of the goods. Apart from specific formalities or similar prescriptions of municipal law, which are not now material, such intention is a question of fact. The usual course of dealing in the export of merchandise, and the interest of the parties concerned in it, suffice for the necessary inference in the absence of evidence to the contrary. When a shipper takes his draft, not as yet accepted, but accompanied by a bill of lading, endorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as drawer, and he further makes the goods, which the bill of lading represents, security for its payment. If, in turn, the discounting banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the endorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of the goods, authorizes and directs the banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done. Particular arrangements made between shipper and consignee may modify or rebut these inferences, but in the absence of evidence to the contrary, and apart from rules which arise only out of a state of war existing or imminent at the beginning of the transaction, the general law infers that, under these circumstances, the ownership in the goods is transferred when the draft drawn against them is accepted."[1]

Sec. 356. Special Clauses in Contracts. In a good many cases the Prize Court, as stated above, had to deal with the legal effect of contracts containing the so-called f.o.b. and c.i.f. clauses. In the case of the *Australia*,[2] Chief Justice Wood of the Ceylon court of admiralty thus explained the effect of the two clauses.

"The effect of the shipment of goods f.o.b. is undoubtedly, as a general rule, to transfer the risk of the loss of the property from the seller to the purchaser and to put an end to the right of stoppage *in transitu*. But such a shipment is not in all cases conclusive of the question whether the goods had become the purchaser's property. 'The real question,' said

[1] As to the general subject of the law governing the passing of property, compare Sec. 108, *supra*.

[2] 11 Br. & Col. Pr. Cas. 315.

Mr. Justice Erle, 'has been on the intention with which the bill of lading was taken in this form: whether the consignor shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract.' . . . It remains only to say a word as to the effect of the shipment of the cargo c.i.f. The leading authority on this question is now the decision of the House of Lords in the case of *Biddell Bros. v. E. Clemens Horst Co.* (1912), (81 L. J. K. B. 42; (1912) A. C. 18), in which the judgment of the majority of the Court of Appeal (1911) (80 L. J. K. B. 584 (1911) 1 K. B. 934) was set aside, and the dissenting judgment of Lord Justice Kennedy was accepted as a complete and accurate statement of the law. After pointing out that by a shipment c.i.f. the goods are appropriated by the vendor to the fulfilment of the contract under section 18 of the Sale of Goods Act, 1893, and that, by virtue of section 32 of the same statute, the delivery of the goods to the carrier, whether named by the purchaser or not, is prima facie to be deemed to be a delivery of the goods to the purchaser, the learned Lord Justice proceeded as follows: 'Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c.i.f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use if the goods are lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative—see the judgments of Lord Justice Bramwell and Lord Justice Cotton in *Mirabita v. Imperial Ottoman Bank* (47 L. J. Ex. 418; L. R. 3 Ex. D. 164). It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative as consignees.' "

In the case of the *Dirigio* [1] and other vessels, Lord Sterndale, interpreting the effect of an f.o.b. contract, held that the rule of prize law that property cannot pass during transit does not apply (a) where the goods are sold f.o.b., payment to be made against documents at the port of loading and the goods are shipped on a vessel chartered by the purchaser and payment is made and all the documents are handed over before the vessel sails, (b) where the goods are shipped on a general ship, not chartered by the purchaser under an f.o.b. contract, including freight and insurance, i.e., a c.i.f. contract, payment against documents at the port of loading and where payment is made and the documents are handed over before sailing; and (c) where the same conditions exist, but payment was not made and the documents were not handed over because of accidents of business, and not because there was any intention to reserve the right of disposal.

[1] VIII Lloyd 395; III Br. & Col. Pr. Cas. 439.

In the case of the *Bärenfels No. 2*,[1] the Prize Court for Egypt was called upon to deal with the familiar clause in shipping contracts, "documents against acceptance." In this case goods had been shipped before the outbreak of war on a German vessel by a German consignor to a British firm in Ceylon to the order of the shippers, "documents against acceptance," a bill of exchange having been drawn by the sellers on the buyers which was discounted with a bank. After the outbreak of war, the British consignees accepted the bill and received the documents from the bank. Judge Grain held that since the contract was one of "documents against acceptance" the property in the goods could not pass until the acceptance of the sellers' draft had taken place, and since the acceptance had only taken place subsequent to the outbreak of the war it amounted to trading with the enemy and was therefore illegal. Consequently it must be considered that no acceptance had taken place and therefore the property remained in the German firm.

A similar case was that of the *Lützow No. 2* [2] (decided by the Prize Court for Egypt), where goods had been shipped by a German firm at Hamburg (the agent of an American company) to a Japanese firm at Tokio, likewise a branch of the American company, the terms of the contract being delivery of the documents "against acceptance of the sellers' draft." The sellers drew on the London agency of a German bank for the account of the buyers and the draft was marked for acceptance at the bank three days before the outbreak of the war. The bank then parted with the documents to the agents of the consignees, but on account of the outbreak of the war the acceptance was never completed. Judge Grain, referring to the "somewhat foolish" parting by the German bank of the documents before the acceptance was completed, stated that completion of acceptance was essential to the passing of the property. In this case there had been merely the "writing of a name" and not the delivery of the bill; this did not complete the acceptance and consequently the property did not pass but remained in the German consignors. But upon appeal, the Judicial Committee reversed the decision and held that the goods were at no time the property of the Hamburg branch but at the time of seizure belonged either to the American company or its Japanese branch.[3]

[1] I Br. & Co. Pr. Cas. 395.
[2] I Br. & Col. Pr. Cas. 533.
[3] VI Lloyd 289.

In the case of the *Lützow No. 3*[1] the facts were the same except that the bank had been given a letter of credit to accept drafts on behalf of consignees generally. The claimants contended that in consequence of the letter of credit, whenever a draft arrived it would be accepted as a matter of course and it must therefore be assumed in this case that the drafts had been accepted and that the property had therefore passed to the Japanese consignees. Judge Grain, however, thought this was assuming too much for a letter of credit since many things might happen to prevent the drafts being accepted, notwithstanding the letter of credit. He therefore held that the letter of credit did not operate as an actual acceptance and hence the property had not passed. Explaining the rôle of a letter of credit such as this he said:

"A letter of credit is merely a request by one party to another to advance money or give credit to a third party or accept bills drawn upon himself. And the person to whom the letter of credit is addressed is merely in the same position, and in no better position, than the person on whose behalf the letter is given. It only gives him authority to accept drafts when they come before him. In this case the cargo is shipped under special conditions—namely, documents against acceptance—and until the drafts are actually accepted no property passes. And although in this case, had it not been for the war, the drafts were certain to have been accepted by reason of the letter of credit, nevertheless no actual acceptance has taken place."

Sec. 357. The Same (Continued). "Documents Against Acceptance." In the case of the *Koerber No. 2*[2] where the goods had been shipped before the war by a British firm on a contract containing the usual clause "documents against acceptance" (of the sellers' draft), and after the outbreak of the war the draft having been accepted by an English firm "to protect the interests of the shipment," Judge Grain held that the acceptance not being on behalf of the consignees was not sufficient to pass the property to the enemy consignees and the ownership therefore remained in the British firm.

In the case of the *Australia*[3] the documents were to be delivered to the consignees against payment or acceptance but the bank mailed them direct to the consignees without taking measures to secure payment or acceptance of the bill of exchange drawn on the consignees. In these circumstances the Prize Court

[1] I Br. & Col. Pr. Cas. 638.
[2] I Br. & Col. Pr. Cas. 640.
[3] III Br. & Col. Pr. Cas. 315.

of Ceylon held that the property did not pass. Adverting to the rôle of a draft in such cases the Court said:

"The general practice of bankers in regard to the negotiation of drafts admittedly is as follows: When a shipper of goods draws on the consignee for the value, and negotiates the draft through a bank, and it is stated on the face of the draft that it is drawn against the goods, and that the documents are attached against payment, the bank is not entitled to deliver the documents to the consignee except upon payment of the draft. The effect is the same where it is simply stated that the draft is drawn against the goods, and that the documents are attached, unless the shipper instructs the bank that the documents are to be delivered against acceptance, in which case the bank is not entitled to deliver the documents to the consignees save upon acceptance of the draft. If no instructions are contained on the face of the draft, the terms on which the bank takes the documents depend upon the instructions otherwise received from the drawer. If there are no such instructions, the documents are to be considered as being received to be delivered on payment. A statement on the invoice that the documents were to be delivered on acceptance would not of itself be acted upon without confirmation. But the points that have to be considered here are, in the first place, whether the shipment of the cargo f.o.b. passed title at once; and, in the next place, whether the manner in which the German company's draft was dealt with by the Deutsche Bank and Messrs. Freudenberg & Co. shews that it was the intention of all parties to the transaction, including the shippers, that the goods should become the property of Messrs. Freudenberg & Co. on shipment or on the negotiation of the draft."

In the case of the *Orteric* [1] goods were sold before the outbreak of the war by an American merchant to a firm in Hamburg on a contract stipulating "payment in Hamburg by net cash in exchange for shipping documents." The bills of lading made the wheat deliverable to the shipper's order, which he endorsed in blank and drew a bill at sight for the price, on the buyers, which he "sold" and endorsed, with the shipping documents attached, to a New York bank. The bank endorsed the draft to a bank in Hamburg, and forwarded it with the documents to that bank for delivery of the documents to the buyers against payment. After the seizure of the goods (Aug. 22, 1914) the documents arrived at Hamburg but the buyers refused to take them up, obliterated their endorsement on the bill of lading and returned them to the Hamburg bank by which they were sent back to the New York bank. Sir Samuel Evans held that the New York bank were pledgees merely but that the sellers did not intend

[1] VIII Lloyd 1.

to reserve any property in the goods when they parted with the documents. The property had therefore passed and he condemned the goods as being enemy property at the time of seizure. But upon appeal, the Judicial Committee reversed the decision and held that the "general property" had not passed either to the New York bank or the buyers and that the goods must be released.[1] The Judicial Committee, however, added that the rights of a belligerent are not exhausted by a single seizure and that if the validity of a first seizure is not sustained a second seizure may be made and relied upon. In the present case if the goods passed to the enemy after August 22, the date of the seizure, there was nothing to prevent the Crown from proceeding to a second seizure. "If the goods had been enemy goods when seized the captors would not have been defeated by a transfer of the property to a neutral before the writ could issue. If the captors took the goods of a neutral or British subject by a bad seizure, they must, in order to avail themselves of a subsequent passing of the property to an enemy, make a fresh and valid seizure. Of this there was no vestige here."

Sec. 358. The Same. Clause: "No Arrival, No Sale." The case of the *Derflinger No. 2*[2] (Prize Court for Egypt) involved the interpretation of a contract containing the clause "no arrival, no sale." The goods were shipped before the outbreak of the war by an enemy seller to a neutral purchaser on a vessel which became an enemy ship. The Crown contended that the words "no arrival, no sale" constitutes a special condition in the contract and that until this condition has been fulfilled there is no passing of property to the neutral buyer. Since there had been no arrival in this case there had been no sale and hence the property remained in the enemy sellers. Counsel for the claimants, on the other hand, contended that the phrase was merely for the protection of the seller against an action for non-delivery in case the goods failed to arrive. The well-accepted meaning among New York merchants engaged in the Chinese trade was, they said, that if goods are shipped under a contract containing these words, the contract was regarded as performed and the title was in the purchasers whether the goods arrived or not. Consequently if they were lost during the voyage the seller was not bound to make a new shipment. Judge Grain adopted this view. He said:

[1] VIII Lloyd 15.
[2] I Br. & Col. Pr. Cas. 398.

"In this case there appears to me to be no intention whatsoever on the part of the sellers to retain the property in the goods which were comprised in the bill of lading handed over on the bill of exchange being accepted. And in using the words "no arrival—no sale" they merely intended to protect themselves from further responsibility in case of non-arrival—that is, they would not be called upon to ship another consignment.

"I am of opinion that in using this phrase the sellers had no intention of reserving any property in the goods; nor, according to the facts placed before me, has the buyer in any way suggested that the property had not passed to him, or that there was any intention in his mind that if the goods did not arrive he had either a right to another shipment or repayment of the money paid."

It having been the intention of the parties that the property should pass to the buyer upon the acceptance of the bill of exchange and the handing over of the documents, the goods must be regarded as neutral property and be restored.

Sec. 359. Status of Shipping or Commission Agents. Not infrequently the decision turned upon the status of commission agents or selling agents of neutral, national or allied houses, domiciled or situated in enemy territory, or the converse. A typical case was that of the *Kronprinzessin Cecilie*,[1] a German ship on which was seized a quantity of lead shipped before the outbreak of the war by an American company under bills of lading endorsed to a German metal company described as "selling agents" of the American company. The shippers drew upon a British company for the provisional price of the lead but on account of the outbreak of war the company refused to honor the draft, whereupon the American company claimed that the property remained in them at the date of seizure. They contended that the German metal company were merely their selling agents who received only a commission on their sales and never had any proprietary interest in the cargo. Sir Samuel Evans replying to that argument said:

"That contention, in my opinion, is unsound. The commission they received—be it remembered not upon the sum realised for the claimant's goods, but upon all the lead they sold in Europe in a previous certain time—was a means of ascertaining the profit they were content to have upon the lead they distributed, with the additional great advantage accruing to them of obtaining the control of the market in that metal.

"In my opinion it was never intended by the claimants to reserve any right of disposal over the goods after they were shipped to the Metallgesellschaft under bills of lading indorsed to them. On the contrary, the whole control over and property in the goods were intended

[1] VIII Lloyd 125; I Br. & Col. Pr. Cas. 623.

thereupon to pass to the German company. It would not be extravagant to surmise that none would be more surprised than the Metallgesellschaft to hear it suggested that the goods were not their property —not even the claimant company itself."

But, said Sir Samuel, assuming for the sake of argument that the German company were nothing more than selling agents, even then the property might still pass to them from their foreign principal.[1] In either case, whether the property passed depended upon intention and was a question of fact. In his opinion both the claimant company and the German company intended that the property should pass and regarded it as having passed.

Sec. 360. Shipments Between Principal Houses and Their Branches. The task of locating ownership sometimes becomes difficult where a commercial house has branches in foreign countries. Thus an enemy subject or house may possess a branch house in a neutral or allied country or even in the territory of the captor state. And one branch house may have shipped goods to another branch house in a neutral or allied country. The question may also arise as to the status of the branch house, that is, whether it may be regarded as a separate entity and therefore capable of itself acquiring the ownership of goods consigned to it by the principal house. The question may also arise as to whether goods shipped by a branch to the principal house or to another branch are the property of the branch house, and if so whether it was the intention of the parties in a particular case that the ownership should pass from one to the other.

Questions of this nature frequently came before the Prize

[1] Here he cited the opinion of Mr. Justice Blackburn in answer to the question of the House of Lords, in *Ireland v. Livingston* (L. R., 5 H. L. 395 at pp. 406-409), the comment of Lord Fisher in *Cassaboglau v. Sibb* (11 O. B. D., pp. 803-4), and Story on *Agency* (9th ed., Secs. 33-34).

In the case of the *Australia* (II Br. & Col. Pr. Cas. 328) the Prize Court of Ceylon referring to one of the parties in the transaction, a commission merchant at Hamburg, quoted as applicable to the case the following opinion of *Lord Blackburn in Ireland v. Livingston*, regarding the rôle of a commission merchant:

"The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the persons supplying the goods to the commission merchant and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall, to the owner of that wall; and just so does the property in the goods pass from the country producer to the commission merchant. . . . The legal effect of the transaction between the commission merchant and consignee, who has given him ownership, is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*."

Courts, and especially those of Great Britain. When the war broke out there were many German and some Austrian branch houses of trade in England, France, and Japan and in neutral countries particularly in America and in the Orient, and there were of course many English, American and other foreign branch houses in Germany. In some cases the foreign houses were alleged to be merely "buying agencies" rather than branch establishments of the principal house and the Prize Courts were called upon to determine their legal status. The following are a few of the more important cases in which such questions were involved.

In the case of the *Eumaeus*[1] the question at issue was the ownership of certain goods shipped in July, 1914, by the Japanese branch office of a German company whose head office was at Hamburg, on an English vessel and consigned to their order at Hamburg. The goods were seized by the British in October, 1914, after the outbreak of the war. The Japanese company claimed the goods on the ground that it was a separate and distinct entity from the German company of which it was a branch house and was therefore capable itself of owning the goods and did in fact own them at the time they were seized. Sir Samuel Evans thus disposed of the contention:

"Looking at the documents, I have no doubt that it is a mere agency —call it a branch if you like—of the head office in Germany, carrying out all the transactions in accordance with the directions of the head office in Germany and on behalf of the head office in Germany. It is said, however, that the Japan Export Co., of Kobe, by the proclamation of September 9, 1914, was in some way permitted by the Crown, as representing this country, to carry on trade with Germany. I fail to appreciate the argument. The proclamation of September 9, 1914, is a proclamation by the King to his subjects, or to other persons therein named resident in this country, with regard to their rights to trade with Germany. It has nothing at all to do with the question as to what a branch in Japan may or may not do with its head office in Germany. The sole question which I have to determine here, in my view, is whether or not these goods belonged to Germans at the time of seizure on October 12. In my judgment it is quite clear that the goods were the property of the Japan Export Co., m.b.H., Germany, and as enemy property they are subject to condemnation."

Sec. 361. The Same (Continued). The converse question came before the Prize Court for Egypt in the case of the *Lützow No. 4.*[2] Here the goods were claimed by an American company

[1] IV Lloyd 270; I Br. & Col. Pr. Cas. 605.
[2] II Br. & Col. Pr. Cas. 122.

which had a branch house in Hamburg. The goods had been bought by the branch house and shipped to another branch house of the American company in Japan. The claim was based on the contention, among others, that the Hamburg branch were merely "buying agents" for the American company or for its Japanese house and consequently the property remained in the American company. Judge Cator in rejecting this contention said:

"I confess that I no more appreciate what is meant by a 'buying agency' as a distinct form of commercial activity than Sir Wm. Scott could understand the term 'nominal firm' in the *Jonge Klassina* (1804) (5 C. Rob. 297; 1 Eng. P. C. 485). If it means a commission agency, or an agency which merely arranges purchases between third parties without the handling of goods, it is clear that the claimant's businesss in Hamburg was not a 'mere buying agency.' For, to take the example now before us, the branch had bought the goods itself from German vendors. It had shipped the goods itself, and had itself drawn a long-dated bill on the Kobe branch to finance the transaction. The property in the goods was indubitably at one time in the Hamburg branch, and I think the property remained there at the time of capture. Mr. Booth admits that if this had been a transaction between two separate firms he could not contend that the property had passed, but he has struggled hard, though unsuccessfully, to convince me that because the Hamburg and Kobe businesses were but branches of the New York company, the moment that Hamburg shipped goods for Kobe the ownership passed there. I cannot accept that proposition. I think that a branch of a company must be treated on the same footing as any other commercial house, and that in respect of the business a company transacts abroad each of its branches has a separate entity as a house of trade, and that in relation to other branches it must be governed by the same rule relating to the transfer of property as would apply if the different houses had no connection with each other. I have no doubt whatever that at the time of capture the ownership of these goods was still in the Hamburg branch, and they must be treated *prima facie* as belonging to an enemy on the well-known principle that property attributable to a business carried on in the enemy country is to be deemed enemy property, even though the business should be that of a national of the captor State or of a neutral. And it makes no difference whether the business be carried on by a single individual, by a partnership, or by a corporation."

But this decision was reversed, upon appeal, by the Judicial Committee.[1] Judge Cator's opinion had been determined in part by his finding that the American company had not entirely closed their business in Germany on the outbreak of the war but was still carrying on trade there to some extent at the time the goods were seized.[2] The Judicial Committee while inclined to accept

[1] *Lützow No. 5*, VI Lloyd 289; III Br. & Col. Pr. Cas. 390.
[2] *Supra*, Sec. 347.

his view as to this point did not consider that it was necessary to decide that question since even if it were true, that in itself would not make the goods German property. As to the fact of ownership Sir Arthur Channell, speaking for the Judicial Committee, said:

"The goods were, of course, not the property and never had been the property of the Hamburg branch as such in fact, and even if that branch had been a separate firm or entity, it is by no means clear that these goods, bought as they were on directions coming from Japan, which in that case would have been properly called orders to buy for Japan, would ever have been the property of that firm at Hamburg. The directions which they received were specific, both as to the goods to be bought, and as to the firm from which they were to be bought. They might have been merely agents to buy, and the property might have vested not in them but in their principals. The adventure was the selling in Japan of goods to be obtained from Germany, for which the Japanese agents of the appellants had either found purchasers or had ascertained that there was a market. The first origin of the matter was in Japan. The agents of the appellants who carried on trade for the appellants in Hamburg, under the name of a branch, were certainly the persons who arranged the terms of purchase from the Chimikalien-Werk, and it was by their act that the property in the goods became vested in the appellants, but they had nothing further to do with the matter. They arranged as agents the details of the finance, but advanced no money, acting under a letter of credit not obtained by them; and before the war broke out they had parted with all control over the goods. They had indorsed the bills of lading and handed them over, not indeed with the intention of passing their property in the goods, for they never had any property, but with the intention of putting a final end to their part of the transaction subject only to some book-keeping credit in their favour of a share of profits in consideration of the work they had done."

His Lordship admitted that the fact that the goods were embarked on a German ship created a presumption against the claimants but he thought that they had clearly shown that the real and true ownership of the goods was neutral and that the dealings of the appellants and their branches had been *bona fide* from the beginning to the end and that the only British complaint against them was want of promptness in closing their trade in Germany.[1]

Sec. 362. The Same (Continued). In the case of the *United States*[2] a claim was made by a New York firm for the release of certain goods dispatched to it by parcels post by a firm in Denmark which was the agent of the American house. The American firm had a branch at Leipzig where two members of

[1] See *supra*, Sec. 347. [2] VI Lloyd 170; II Br. & Col. Pr. Cas. 390.

the firm partly resided. The goods in question had been shipped from the Leipzig branch to the Danish house and by the latter re-forwarded to the American house. The claimants contended that the principle of non-transferability of property *in transitu* referred only to the state of the property at the time of shipment and since the goods in the present case, although they may have been of German origin, were neutral goods at the time of shipment, were not condemnable. But Sir Samuel Evans said he was unable to grasp this argument and saw no foundation for it. The goods, he thought, belonged to the Leipzig house and it mattered not who the partners were or what was their nationality or residence. Adverting to the contention of the claimants regarding the meaning of the rule in respect to transfers *in transitu* he said: "Shipment does not mean the place where the goods are first handed from somebody on land to a ship. For the purpose of this case the transit begins not where they were shipped at Copenhagen but when they were sent from Leipzig."[1] They were therefore condemned as the property of an enemy.

Sec. 363. Goods Shipped by Neutral Branch of Enemy House to Neutral Consignees. Two important cases were those of the *Annie Johnson* and the *Kronprinsessan Margareta No. 2*,[2] the last of about thirty-seven of the famous "Trinks" cases decided by the British Prize Court. The question here was the liability to condemnation of a quantity of coffee consigned during the war to a Swedish firm, shipped on Swedish vessels, by Trinks and Co. of Santos, Brazil, a buying branch of the house of Trinks & Co. of Hamburg. The goods were claimed by the Swedish consignees on the ground that the property passed to them on the date of shipment. They argued that the goods were shipped on a c. and f. contract at the risk of the claimants, that it was the intention of the parties that the property should pass to the claimants on shipment and that the sellers had not reserved any *jus disponendi*. They also emphasized that they had bought the coffee for Swedish consumption.

Sir Samuel Evans at the outset observed that the transactions in these cases were all *post bellum* transactions, unlike those in the *Miramichi* and *Parchim*. In a long opinion he discussed in detail the transactions and examined in turn the various contentions put forward by the claimants. Assuming, he said, that

[1] See below, Sec. 390.
[2] VII Lloyd 166; III Br. & Col. Pr. Cas. 138.

the contract of sale was *bona fide* and that the Santos firm was a neutral house and the law to be applied in determining ownership was the municipal law (which he did not admit), he was bound to hold that the property had not passed at the date of seizure. If Trinks & Co. of Santos were to be regarded as an enemy firm the goods would have to be treated as enemy goods during transit and the claimants could not be regarded as the owners until the goods were actually delivered and in their possession, this, in consequence of the rule relative to transfers during the existence of war. On the other hand, if the Santos house were to be regarded as a neutral house and the goods were intended for the use or disposition of the Hamburg house they would have to be treated as enemy goods whether the legal property according to municipal law remained in the shippers or not.

Regarding the relationship between Trinks & Co. of Hamburg and Trinks & Co. of Santos, Sir Samuel observed that they had "interests in common, even if they are not identical." "My view is," he added, "that the Santos house was only a buying branch of the Hamburg house. The sole proprietor, who subscribed the whole of the capital for the Santos house or branch, was a partner in the Hamburg firm." Concluding, he said:

"In this case the goods at the time of shipment were the property either of the Santos house or of the Hamburg house of Trinks. In dealing with the position in the other cases, I said that 'where a person has interest in both an enemy and a neutral house of trade, and the transactions between the two are so mixed up as they are in these cases, the Court will not undertake itself to unravel the tangle. That is the duty of claimants; and if they fail in it they must suffer the consequences.'

"I think there is enough evidence in this case upon which to find that the Santos business was a mere agency or branch of the Hamburg house, and that before shipment the goods were the property of an enemy firm. The result then would be, according to the rule of Prize Courts, that they would remain enemy property during transit, and be enemy property at the seizure.

"But if they were the property of the Santos house as an entity distinct from the Hamburg firm, I should find that, having regard to the intimate connection between them, and to the share held by Peter Trinks in both, and to the whole evidence, the Santos firm and Gewalt were acting in concert and in the interests of the Hamburg firm in the purchase and shipment of the coffee; and I should, without hesitation, apply the rule referred to, or extend it if need be, and decide that what was done was in fraud of the rights of belligerents; and that the property could not pass *in transitu*, and therefore remained in the shippers. They have made no claim. And, in any event, the goods

would suffer under the doctrine of contagion from the presence on the ships of other condemned goods belonging to the same owners."

Sec. 364. Claims of Mortgagees, Pledgees, Insurers, Etc. Not unfrequently other claimants than sellers or buyers appeared before the Prize Courts and the latter were obliged to determine whether the claimants had a proprietary right in the goods at the time of seizure. Such were mortgagees, pledgees and insurers. In the case of the *Ningchow* [1] a cargo had been shipped before the war by a German firm at Hankow on a British vessel consigned to an English firm at Liverpool. The Yokahama Specie Bank had made an advance of money on the security of the shipping documents which were endorsed to the bank. After the outbreak of the war the British consignees refused to take up the goods or documents and the bankers as pledgees contracted to sell the goods to another British firm. The goods being seized the question was raised as to whether the pledgees were the owners of the goods at the time they contracted to sell them to the English firm. Sir Samuel Evans held that they were. "In my mind," he said, "the inquiry as to whether the property in the goods had so passed is irrelevant to the question which has to be determined in this case, which is, whether they belonged to enemy subjects at the time of the seizure."

It had been admitted by counsel for the Crown, he said, that the pledgees were entitled to exercise their power of sale. The right of the enemy pledgors to redeem the goods had therefore been lost to them and accordingly they ceased to be in any sense the owners of the goods when the bank contracted to sell them, apart entirely from any question which might exist, as between the sellers (the pledgors) and their purchasers, of whether according to the law of the sale of the goods, the property remained in the sellers or had passed to the purchasers. The goods were not therefore subject to condemnation as enemy property.

But in the case of the *Odessa* and *Cape Corso* [2] Sir Samuel laid it down that in such circumstances the property remained in the owners until the pledgees had actually exercised their right of sale. That is to say, the mere fact that the right to sell has accrued to the pledgees does not by itself make them the owners. Furthermore, enemy pledgors to neutral bankers do not lose their right to redeem the goods by reason of the outbreak of war, although the documents are held by British agents of the

[1] III Lloyd 156; I Br. & Col. Pr. Cas. 288.
[2] I Lloyd 301; I Br. & Col. Pr. Cas. 163.

bankers who are prohibited from commercial intercourse with the enemy and although the bankers are merely pledgees whose rights are unenforceable in a Prize Court. So as regards insurers, the owner of insured goods loses his proprietary right in them by abandoning them to the underwriters.[1]

Where a cargo shipped by a South American company on a British vessel to consignees in Hamburg was insured for 97½ per cent of its value with German underwriters who after seizure paid for the total loss, it was held that the German underwriters were the owners at the time when the claim was made and consequently the proceeds must be condemned.[2]

Sec. 365. Transfers of Ownership After Date of Capture. Generally the Prize Courts held that goods which were non-enemy in character at the date of capture but which were transferred to enemy owners after that date must be treated as enemy goods. This question was raised in the British case of the *Palm Branch,*[3] where at the time of capture the goods were admittedly the property of a neutral firm but a year later when the claim came before the Prize Court they had become the property of enemy underwriters. The claimants contended *inter alia* that the neutral or enemy character of goods depends solely upon their character at the date of capture or seizure and since the goods in question were admittedly of neutral ownership at the time of seizure they were not liable to condemnation by reason of the fact that their enemy insurers had subsequently paid to the neutral owners the total loss thereon. Such payment, they argued, did not convert them into enemy goods. Goods belonging to an enemy at the date of capture being liable to condemnation even though neutral insurers have after capture paid a total loss thereon, the converse proposition ought to be admitted. Sir Samuel Evans admitted that the point raised was a novel one and that there did not appear to be any reported decision governing the case but he thought the practice and forms of the Prize Court for a long time were based on the theory that property claimed by a neutral must not only have belonged to him at the time of capture but also at the time the claim was asserted in the Prize Court and would go to him in case it was restored. On these grounds he condemned the goods as enemy property but upon appeal the decision was reversed by the Judicial Com-

[1] The *Rijn*, VI, *ibid.*, 181; II, *ibid.*, 507.
[2] The *Palm Branch*, VI, *ibid.*, 1; III, *ibid.*, 241. See also the *Dirigio and Other Vessels*, VIII Lloyd 395.
[3] VI Lloyd 1; II Br. & Col. Pr. Cas. 281.

mittee.[1] The Judicial Committee reaffirmed its view in the case of the *Orteric*[2] where it stated that while the date of capture was the "crucial date" for the case of the captors, at the same time "subsequent dates may affect the claimant's rights independently of any mere traverse of the captor's claim." "Thus a claimant, having succeeded in his contention that what the captors seized was then his property, may nevertheless fail to establish a right to have it released to him, if before he comes before the Court to claim as owner, it has become enemy property. He cannot then truly claim the goods as his. In order to obtain the release of the goods to himself he has to prove that the goods were his when seized and that he is still the person who, so to speak, can give a good discharge for them, if the court decrees their release to him."[3] The German Supreme Prize Court in the case of the *Eskimo*[4] adopted the same view in holding that goods which were non-enemy at the time of seizure but which became enemy property thereafter in consequence of the cession of the bill of lading must be condemned as enemy goods. All enemy merchandise, said the Court, seized on the open sea is confiscable and one cannot see why the decision relative to the question of whether if this is the case, must be transferred to another moment than that at which the decision is made. If the goods have become enemy property only after their seizure, that is sufficient to create the legal basis necessary to their confiscation previously pronounced. The Italian Prize Commission laid down the same rule.[5]

II

Transfers of Ownership During or in Expectation of War

Sec. 366. Law Applied by the British Prize Courts. While, as stated above, the British Prize Courts generally applied the rules of municipal law (the civil law or commercial law) in determining the ownership of goods shipped prior to the outbreak of war, they applied the principles of prize law in the case of shipments made during the war or when the outbreak of war had already become imminent. It is one of the estab-

[1] VI, *Ibid.*, 18; III, *ibid.*, 241. [2] VIII Lloyd 13.
[3] To the same effect see the *Prinz Adalbert* (Part Cargo), V Lloyd 1; the *Frogner*, VIII, *ibid.*, 382; and the *Zaanland*, X, *ibid.*, 343.
[4] I *Entsch.* 383; Fauchille et De Visscher, 292.
[5] The *Moravia* (Cargo). Fauchille et Basdevant, *Jurispr. Ital.* 103.

lished principles of prize law that the national character of goods cannot be changed during the course of a voyage, or as is commonly said, *in transitu,* or after the date when hostilities have become imminent. Consequently a transfer of goods by sale or otherwise from an enemy to a neutral during the existence of war, or from a prospective enemy when war has become imminent, is considered invalid and the ownership is deemed to continue as it was at the time of shipment until the actual delivery. This customary rule has been incorporated in the prize codes and regulations of many States and was strictly applied by the Prize Courts of many of the belligerents during the World War.

Sec. 367. Transfers Before Outbreak of War. Case of the "Southfield." The question first came before the British Prize Court during the late war in the case of the *Southfield,*[1] which involved the validity of the capture of certain goods which had been sold by German merchants to Dutch merchants between July 20 and 30, 1914, and which were seized on a British ship on August 4 after the outbreak of war between Great Britain and Germany. The Dutch merchants had paid for the goods and had resold them to customers of their own before the outbreak of the war and had apparently from first to last acted with complete *bona fides.* The Crown, however, claimed condemnation of the goods on the ground, as alleged, that the transfer of ownership had been made when war was imminent and expected and that the sellers knew it and made the sale in order to protect the goods against probable capture. After adverting to the decision of Lord Stowell in the case of the *Vrow Margarita* (1 C. Rob. 336; 1 Eng. P. C. 149), the authority of Judge Story in his *Principles and Practice of Prize Courts* (Pratt's ed. pp. 64-65) and the decision of the Privy Council in the case of the *Baltica* (11 Moo. P. C. 141; 2 Eng. P. C. 628), where the general rule had been laid down that transfers of goods made during the imminence or expectation of war were invalid as against the right of capture, Sir Samuel Evans came to the conclusion that the vendors did not have in contemplation the outbreak of war between Germany and Great Britain when they sold the goods and consequently the transfer of ownership was not invalid and the goods must be released. In the light of subsequent events, he said, war with Great Britain might be spoken of as imminent "regarded from the point of view of time, in the last two weeks

[1] III Lloyd 404; I Br. & Col. Pr. Cas. 332.

of July"; but there "was no evidence that it was regarded as imminent in its proper meaning of 'threatening or about to occur,' by German merchants at that time." As throwing light upon the facts, he referred to Headlam's *History of Twelve Days*. Sir Samuel also took occasion to point out that in this case he was dealing with a transfer of goods and not of vessels and that "the special and highly artificial rules as to the transfer of vessels during or preceding a state of war" as laid down in the Declaration of London were inapplicable to goods or merchandise.

Sec. 368. The Same. Case of the "Daksa." In the case of the *Daksa*,[1] which involved the validity of the seizure by the British on August 10, 1914, of a quantity of barley which had been sold while at sea by its German owners on August 1 to French purchasers when war between Germany and Austria on the one hand and France on the other was imminent, the Judicial Committee affirmed the decision of the Prize Court at Gibraltar that while the transfer had been made in fraud of the rights of French captors, the parties did not have in mind any expectation of war between Great Britain and Germany and therefore the transfer was not invalid as against the British captors. The opinion of Sir Samuel Evans in the case of the *Southfield* was approved by the Judicial Committee, which emphasized that a transfer induced by apprehension of war is not void; it merely cannot be set up against those in fraud of whose rights it is deemed to have been made. In this case the transfer could not be deemed to have been in fraud of their rights of British captors, because there was nothing to show or to establish a presumption that the transferor was induced to make the transfer because of apprehension of war between Great Britain and Germany. Lord Parker discussing the effect of such transfers and the onus and nature of proof to establish innocence, said:

"First, where a transfer of goods at sea is induced by apprehension on the part of the transferor at the outbreak of hostilities between the State to which he owes allegiance and another State, such transfer is deemed to be in fraud of the belligerent rights of the latter State; and should such hostilities subsequently arise, and the goods be seized as prize, the transferee cannot—at any rate if he were aware of the apprehension which induced the transfer—set up his own title in order to shew that the goods had at the date of seizure lost their enemy character. Secondly, if at the date of transfer the circumstances were such as to give rise to a general apprehension of war, the onus is on the transferee to prove the complete innocence of the transaction. It will not

[1] V, *ibid.*, 317; II, *ibid.*, 358.

be enough to prove his own innocence. He must prove also that the contract was not induced by apprehension of war on the part of the transferor. Thirdly, the transferee may discharge this onus by shewing that the transfer was pursuant to a contract made at a time when no such hostilities were apprehended."[1]

Sec. 369. Necessity of Delivery. Case of the "Kronprinsessan Margareta." In the case of the *Kronprinsessan Margareta and other vessels*[2] Sir Samuel Evans reaffirmed and applied the "well-established" rule of English prize law that the national character of goods cannot be changed during or in imminence of war so as to defeat the belligerent right of capture. Referring to the character of the rule, he said:

"As Lord Kingsdown said, in the judgment delivered in the Privy Council in the *Baltica* (1857), (11 Moo. P. C. 141, at pp. 145, 146; 2 Eng. P. C. 628, at pp. 630, 631), the general rule is open to no doubt. He there stated it in precise and unambiguous terms as follows: 'A neutral while a war is imminent or after it has commenced is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*.'

"He discusses two alternative grounds for the rule, one being that, while the ship is on the seas, the title of the vendee cannot be completed by actual delivery; and the other that the ship and goods, having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by belligerents until the voyage ends. He gives the preference to the former ground, and amplifies it in the following passage: 'Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great that the Courts have laid down as a general rule, that such transfers without actual delivery, shall be insufficient; that in order to defeat the captors the possession as well as the property must be changed before the seizure.'"

He added that even if the doctrine of the common law governing the passing of property in time of peace were applicable in the

[1] Compare in this connection the rule laid down by the Privy Council in the case of the *Edna* (*supra*, Sec. 315), relative to the nature of proof required in respect to the transfer of vessels.

[2] VI Lloyd 222; II Br. & Col. Pr. Cas. 409.

present case, he would hold that the property had not passed to the neutral claimants and would have to be condemned. Upon appeal the decision was affirmed by the Judicial Committee.[1] Lord Sumner after referring to the rule "which refuses to recognize transfers of the ownership of moveables afloat from an enemy transferor to a neutral transferee when unaccompanied by actual delivery of the goods" as one which had been well settled for about one hundred and fifty years, thus described the history and nature of the rule:

"The rule against recognising transfers of enemy goods while at sea, if unaccompanied by actual delivery and transfer of possession, is so well established and is now so ancient that its authority cannot be questioned or its utility impugned for the purpose of a judicial determination. Its application assumes that the circumstances of the shipment and the dealings with the shipping documents, and otherwise, are not such as to make the shipment itself an actual delivery of the goods to the transferee through his agent the carrier. It assumes also that a documentary transfer has taken place in good faith by a real and not a sham transaction, and that in pursuance of that transfer rights have been acquired by the transferee which in other courts not bound by such a rule would be valid and enforceable. With sham transactions Courts of Prize would deal in another fashion; with incomplete transactions insufficient to transfer rights no Court would deal at all. The expression 'mere paper transaction,' sometimes used, does not imply that something unreal or ineffectual in itself is under discussion. It serves to draw attention to the fact that the transaction is unaccompanied by any dealing with the goods themselves, such as by its overt or notorious character would serve to inform the captor as to the subject which he seizes and the nature of the right, if any, which he may be entitled to acquire in consequence. The history and the theory of the rule, neither of which is now very clear, are too inconclusive to add weight to the rule itself or throw light on its true application. It appears to have been regarded as a particular example of a wider principle—that the national character of moveables cannot be changed while they are at sea by any independent dealings or occurrences. Thus in the *Negotie en Zeevaart,* decided on appeal in 1782, the question was whether a ship, which went to sea a Dutch ship, had ceased to bear that national character when she was taken, because the Dutch colony of Demerara, from which she sailed, had before her capture become British by capitulation to the British Crown. It was held that she had not. This was followed in the *Danckebaar Africaan,* where the question was whether the capitulation of the Cape of Good Hope, which had taken place after the ship sailed, but before her capture, and had made British subjects of the Dutch owners, had not also entitled them to claim their ship on arrival at the Cape as prize on the ground that there had been in fact a capture of British property. So strict was the rule even then that the claimants, although British subjects themselves at the time of capture, could not

[1] VIII, *ibid.*, 248; III, *ibid.*, 803.

be heard to assert that title against the presumptions arising when the ship sailed. Shortly afterwards it was accepted in the *Vrow Margaretha* that there was no recorded instance of a claim being sustained for goods purchased of an enemy in transit in time of war, for the practice of the High Court to look only to the time of shipment was already invariable."

Sec. 370. Transfers *in Transitu*. Case of the "Dirigio" and Other Vessels.[1] In this case Lord Sterndale held that the rule of prize law that property cannot pass from an enemy to a neutral during transit does not apply in certain cases.[2]

Specifically, he refused to condemn certain goods shipped by a German firm in New York during the war to a neutral firm in Copenhagen with the intention that they should be forwarded to Germany. The Crown relied upon the established rule of prize law that property cannot pass from an enemy to a neutral during transit. The goods being enemy property at the time of shipment they remained such at the time of seizure and were not entitled to the protection of the Declaration of London. But on the ground that the shipments came within the exceptions referred to, they were released. Adverting to the third exception to the general rule, namely, where the documents are not handed over owing to accidents to business and not because of any intention on the part of the vendors to reserve the *jus disponendi*, Lord Sterndale stated that "the question of when property passes is one of the intention of the parties" and he thought the intention here was that it should pass to the neutral consignees when the goods were placed on board the ship and that from that moment the master held the goods as bailee for the person named in the bill of lading. This was equivalent to delivery and differed from the case of goods on a ship, which were still the property of the enemy at the time of sailing and which were transferred during the course of the voyage.

Sec. 371. The Same. Case of the "United States." On the other hand, the British Prize Court interpreted the rule respecting transfers *in transitu* to apply to other transfers than those merely made at sea between shipment and delivery. Thus in the case of the *United States* [3] Sir Samuel Evans, referring to some "concrete cases," said:

"If goods of a contraband nature had been bought by the enemy in America before shipment at New York, in circumstances where the legal ownership would remain in a neutral vendor according to the law in

[1] VIII, *ibid.*, 395; III, *ibid.*, 430. [2] They are mentioned, *supra*, Sec. 356.
[3] VI, *ibid.*, 170; II, *ibid.*, 390.

peace, they could still be captured on the voyage to Germany to the enemy purchaser on the ground that they would be his on delivery, on whatever vessel, neutral or otherwise, they might be carried. So if goods of any kind so bought were shipped on an enemy vessel, or on a British or Allied ship, they would be capturable. It would be no answer to say that the matter had been so arranged that by municipal law the property would not pass until the goods had safely reached the hands of the enemy. The goods would be regarded in such cases as enemy property.

"So in regard to goods shipped from the enemy country, if purchased by neutrals during a state of war the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery—see Story, *Notes on the Principles and Practice of Prize Courts* (Pratt's ed., p. 64)."

This was a case under the Reprisals Order of March 11, 1915, in which Sir Samuel issued a decree of detention of certain goods that had been ordered and in some cases paid for by neutrals prior to the Reprisals Order, and which had been dispatched from German factories and shipped to the United States by parcels post on a Danish steamship, before the Reprisals Order went into effect. The Crown contended that they were liable to detention under the Order because they were both of enemy origin and were enemy property. The claimants did not deny that they were of enemy origin but claimed that they were neutral property on the ground that the ownership had passed before seizure from the German vendors to the neutral purchasers in America; and that in fact they became their property as soon as the goods left the German factories, although in every case they left after the Reprisals Order had been issued. Adverting to the character of the Reprisals Order, Sir Samuel pointed out that it did not add anything to the list of confiscable articles, and in this respect dealt "more tenderly and generously with neutral commerce" than the old and existing law of strict blockade under which ships and cargoes were condemned and not merely detained. The Order, he said, dealt with maritime commerce during war "on the analogy of the law of prize." Indeed, it was under the international law of prize that the Order as one of reprisal derived its validity and by this law property in goods sent by sea passes only on actual delivery. Upon this analogy the goods in question must be held to be enemy property, otherwise the provisions of the Order regarding "enemy property" would be rendered nugatory, "because, in order to defeat them, all that would be necessary would be that an enemy and his sympathetic neutral should take such steps as would

make all goods shipped to and from Germany in theory and on paper the property of the neutral in the strictly legal sense during the whole of the transit."

Sec. 372. The Same. Cases of the "Posterior" and Others. The rigorous doctrine that all goods shipped by neutrals during war to purchasers domiciled in enemy country, are deemed to be enemy goods, subject to the qualifications referred to above, and that conversely all goods shipped by enemy owners to neutral purchasers retain their enemy character until delivery was reaffirmed in emphatic terms by Sir Samuel Evans in the case of the *Posterior and Other Vessels*,[1] one of the numerous Trinks cases. Asserting that the question of ownership of goods carried by sea in time of war must be determined in accordance with the doctrines of prize law and not municipal law, he added:

"There are also some other rules of law prevailing in this Court which may be of importance in some aspects of the claims, which I wish to note. It is an established rule of the Prize Courts that goods going during war to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, are, if seized *in transitu*, to be considered as enemy property. (See the *Sally* (3 C. Rob. 300 n); the *Packet de Bilbao* (2 C. Rob. 133); the *Anna Catharina* (4 C. Rob. 111); and also Story's *Notes on the Principles and Practice of Prize Courts* (Pratt's ed., p. 65).) Accordingly, if the true inference from the facts in any case should be that the goods seized were intended to become the property of G. Trinks & Co., of Hamburg, to be disposed of by them, the goods would be regarded while *in transitu* as enemy property, even though the shippers at Santos were admitted to be neutrals and had the strict legal ownership according to municipal law.

"It is well also to bear in mind that side by side with the rule just mentioned there exists another, in a converse case, namely, where goods are shipped by an enemy to a neutral they will be regarded during transit as enemy property until actual delivery to the neutral."

Again, in the case of the *Den of Arlie*,[2] which involved the liability to confiscation of certain goods shipped during the war by an American company on a British ship for carriage to Liverpool with the intention that they should be forwarded to Copenhagen and ultimately to buyers in Germany, Sir Samuel Evans quoted with approval the rule of prize law laid down by Story (Pratt's ed. p. 65) that "property going during war to be delivered in the enemy's country, and under contract to become the property of the enemy immediately on arrival, if taken *in transitu* is to be considered as enemy property." This, he said, was the right rule:

[1] VII, *ibid.*, 21; III, *ibid.*, 275. [2] VII Lloyd 152.

"Otherwise anybody so minded in the United States, or any other neutral country, by keeping the property in the legal sense in himself and not vesting it in anybody until the actual arrival of the goods, might send to Germany, by means of sea voyages, any property he liked. The right of belligerents of capture at sea would thus vanish very quickly, except in the case of the carriage of contraband."

Adverting to the arguments of counsel for the claimants that the goods ought not to be confiscated because they had not become at the time of seizure the property of any enemy subject, he said:

"They [the arguments] are dealt with in two categories. In one category are placed the goods which were sold to customers. Therefore, within the doctrine to which I have referred, these goods were sent forward with the intention that they should become the property of these customers upon their arrival; it does not matter whether it is immediately on their arrival or not. It was equally intended, in my opinion, that the goods in the other category should become the property of enemy subjects. The branch, as it has been called, of the Crucible Steel Company, in Berlin—which also has some place of business in Hamburg—is a registered limited company of Germany, and the goods, if they were intended to be sent to them, would become sufficiently their property to bring them within the doctrine to which I have already referred. In any event, supposing the goods were only sent to them as agents, to be sold to people in Germany I can infer where they were to be sold from the whole transaction, the history of which I know now; and, whether they were sold by the G. M. B. H. [the limited company] as agents for the American company or not, the goods were sent across the seas with the intention of becoming the property of enemy subjects on arrival in the enemy country."

This doctrine had the effect of a two-edged sword. If the seller were an enemy and the purchaser neutral the goods were regarded as enemy property during transit; conversely, if the shipper was neutral and the consignee an enemy, they would be treated equally as enemy goods. This was clearly laid down by Sir Samuel Evans in the *Annie Johnson* and the *Kronprinsessan Margareta No. 2*,[1] one of the Trinks cases, where he said:

"If Trinks & Co., of Santos—shipping under the name of Compania Nacional de Café—are to be regarded as enemy traders, the goods would be treated as enemy goods during transit, and claimants (neutral) would not be regarded as the owners while the transit continued, or until the goods were actually delivered into their possession. Further, if the shippers are to be regarded as neutrals, and the goods were destined for

[1] VII Lloyd 166; III Br. & Col. Pr. Cas. 138.

the use of or to be at the disposition of Trinks & Co., of Hamburg, on arrival, they would be treated as enemy goods, whether the legal property according to municipal law remained in the shippers or not."

Sec. 373. German Jurisprudence. The German Prize Courts did not attach the same importance to the distinction which the British Prize Courts made between transfers effected before and those effected after the outbreak of war, nor as to the distinction between the applicability of municipal law and international law in determining the question of ownership. On the contrary, they applied the rules of private international law governing contractual obligations and did not distinguish between transfers of ownership made at the moment of contract or embarkation and those made during the transit except in the case of transfers made by an enemy to a neutral. Likewise, unlike the British Prize Courts they did not give the priority to national law in determining questions of ownership arising out of contracts made before the outbreak of war but took into consideration the laws of other States whose subjects were parties to the prize proceedings.[1] Thus in the case of the *Eskimo*,[2] which involved the liability to capture of certain non-contraband goods shipped in 1917 on a British vessel by neutral persons (Norwegian) to English consignees and where the former contended that the property had not passed to the latter at the time of seizure, the German Supreme Prize Court, affirming that the claimant must prove that the transfer of ownership had not "arrived at execution" at the time of seizure, said: "There is no doubt that Norwegian law recognizes the transfer of the ownership of merchandise by the cession of the bill of lading. But this imports little, because the goods were destined to England where the documents must also be accepted. The question whether if, by this last transaction, the ownership of the goods is transferred, as that of the bill of lading, must be determined according to English law, because that is the law of the thing involved in the contract. The claimants themselves do not contest, that according to English law the ownership of the goods may be transferred by bill of lading. There is nothing to show that in this case the transfer had not taken place by the cession of the bill of lading, after the capture of the ship. According to German law the question is litigious

[1] Compare Verzijl, *op. cit.*, p. 485.
[2] I *Entsch.* 382; Fauchille et De Visscher, *Jurispr. All.* 292. See also Sec. 108, *supra.*

whether if the effect *in rem* of the cession of the bill of lading depends or not on the fact that the goods are still in the possession of the captain of the ship. English law does not establish this dependence.[1]

Thus the German Supreme Prize Court did not follow the rigorous rule of the British Prize Courts that all goods shipped during the war by a neutral to an enemy consignee were to be declared enemy property regardless of what would have been their character according to the ordinary rules of municipal law had they been shipped in time of peace. On the contrary, it recognized as neutral property goods shipped during the war by a neutral seller to an enemy purchaser when, according to the municipal law applicable, the ownership had not passed to the enemy consignee.[2]

But the German Prize Courts, like those of Great Britain and other countries, refused to recognize the validity of transfers of property from enemy to neutral ownership made during transit, after the outbreak of war. Thus in the case of the *Lestris* [3] the Supreme Prize Court held that when a transfer of property has been made by the transfer of a bill of lading, it is not sufficient for the validity of the transfer that the bill of lading has been dispatched before the commencement of the voyage; it is necessary that it should have been received before the transfer. Further, a neutral cannot claim to have acquired validly by transfer the ownership of goods through the fact that he has bought and paid for them before the departure of the ship, when they have been taken *en depôt* for its account by the enemy firm which has sold them to him and the said firm has reserved

[1] To the same effect see also the case of the *Ella*, II *Entsch.* 60 and the *Victoria*, II, *ibid.*, 281.

[2] See the case of the *Eskimo* (*supra*) and the *John Wilson*, I *Entsch.* 326; Fauchille et De Visscher 245. In the latter case the ownership of goods sold and shipped during the war by a Dutch firm to English purchasers, even though shipped at the risk and expense of the latter, was held to have remained in the shippers until delivery and hence the owners were entitled to damages for their destruction by a German submarine. In such a case a British Prize Court would have held that the goods were enemy property because shipped to an enemy in time of war. Compare the English cases cited above, Secs. 370-372; also the observations of Verzijl, *op. cit.*, 489.

See also the case of the *Arena* (I Entsch. 343), where the Supreme Prize Court held that the property in goods sold during the war by a Danish merchant to English purchasers had not passed at the time of destruction because the latter had not received the documents. A similar case was that of the *Hudiksvall* (I, *ibid.*, 369), and so were the *Björ* (II, *ibid.*, 48), the *Jägersburg* (II, *ibid.*, 53), the *Pauline* (II, *ibid.*, 233) and especially the *Balduin No. 2* (II, *ibid.*, 66), where the principles laid down by the German Supreme Prize Court are directly contrary to those which the British Prize Courts declared to be those of the law of nations.

[3] II *Entsch.* 207; Fauchille et De Visscher, *Jurispr. All.* 302.

the right to sell them, if its interests require, and to replace them by other goods of the same quality.

Sec. 374. French Jurisprudence. Apparently the French Prize Council did not find it necessary, as did the prize tribunals of Great Britain and Germany, to pronounce upon the question as to what national law should be applied in determining whether the property in goods shipped during war had passed or not from the seller or shipper to the purchaser or consignee.[1] Numerous cases involving the question of the ownership of goods seized at sea came before the Prize Council and it generally based its decisions on the evidence furnished by the claimants showing whether they had reserved the right of disposal of the goods. This evidence was found in the documents, bills of lading, etc., in the hands of the claimants. The production alone of a bill of lading to order and endorsed in blank was not considered sufficient to establish the ownership of the claimant but might under special conditions constitute a presumption of ownership. Thus in the case of the *Eir No. 1* [2] it was held that in the case of goods seized on a neutral ship he must be considered as the owner who, appearing on the bill of lading as the shipper, had the sole right of disposal and that where two persons claimed the same goods he who produced the bills of lading, the invoices and the receipted bills must be considered as the owner, rather than he who produced copies of the bills of lading unsigned by the captain.[3] Likewise, it was not sufficient to establish ownership, for neutral claimants to produce only one of the three invoices, none of which mentioned their name, when it was established that they were only agents charged with surveillance of the sale.[4] Even when all the documents were produced by the claimants, the evidence of ownership was not

[1] The question was raised in the case of the *Porto* (Fauchille, *Jurispr. Franc.* 137), where the claimants of goods shipped on a German ship to Germany were a French company which contended that the property had not passed to the German purchasers, because under article 1585 of the French Civil Code the particular sale would not be complete until the goods were delivered and weighed. But the Prize Council avoided passing on the question as to whether the ownership must or must not be determined on the basis of French law, by holding that the sale of the goods by weight was not such in fact and hence it was unnecessary to decide whether in case it had been such, French law would have to be applied.

[2] Fauchille, *Jurispr. Franc.* 32.

[3] To the same effect see the *Czar Nicolai II* (*ibid.*, 10); the *Karimata* (*ibid.*, 62) and the *Appollonia* (*ibid.*, 66).

[4] The *Boeroe* (*ibid.*, 53). Compare also the cases of the *Jiul* (*ibid.*, 26), the *Narrovian* (*ibid.*, 68), and the *Gorontalo* (*ibid.*, 72), in all of which the proof of ownership was held to be insufficient. In the last-mentioned case the claimants failed to produce all of the three bills of lading.

always regarded as sufficient, as for example when the claimants were mortgagees, agents or commissioners.[1]

While the French Prize Council in accordance with the *règlement* of July 26, 1778, relied primarily on the evidence contained in the papers found on board it did not hesitate to allow claimants to produce extrinsic evidence in support of their claims.[2]

It is hardly necessary to observe that the French Prize Council, like the prize tribunals of other countries, refused to recognize the validity of transfers of property from enemy subjects to neutrals, made *in transitu* during war.[3]

Sec. 375. Italian Jurisprudence. The jurisprudence of the Italian Prize Commission was similar to that of the French Prize Council. Whether the ownership of goods seized on enemy ships was neutral depended on the evidence furnished, in the main, by the papers found on board, all of which had to be produced by claimants in order to establish their ownership.[4] Under special conditions, however, the production of extrinsic evidence was admitted.

III

Nationality of Companies

Sec. 376. Preliminary Observations. Claimants before the Prize Courts were frequently companies and the liability of their goods to capture, in consequence, depended upon the enemy or non-enemy character of the companies. At the outset some of the Prize Courts made a distinction between corporations (*juristische Personen*) and partnerships (*Handelsgeschäfte*), the nationality of the former being determined by their place of registration or incorporation (*siège social*), that of the latter by the nationality of the partners. During the course of the war, however, the criterion adopted in the case of incorporated com-

[1] Cases of the *Eir* and *Boeroe* (*supra*).

[2] Decision of the Council of State in the *Czar Nicolai II* (*ibid.*, 258), where certain certified documents produced before the English consul at Tiflis and certain declarations received by him were admitted as evidence.

[3] The *Athena*, *Anatolia*, *Bogados*, and others (*ibid.*, 457): "Whereas enemy property subject to the right of capture cannot in the course of shipment during war, be validly withdrawn from the exercise of the right of capture by transfer to a neutral . . . that this ancient rule of the law of nations has been affirmed notably by the powers assembled at the Naval Conference at London in 1909."

[4] See, among others, the case of the *Moravia*, Fauchille et Basdevant, *Jurispr. Ital.* 35.

panies was abandoned by certain States and other criteria were substituted such as the nationality of the incorporators or directors. Thus the distinction between the two kinds of companies largely disappeared. Some of the Prize Courts also made a distinction between the owners of goods and the owners of ships and applied a different rule for the determination of the nationality of each.

Sec. 377. Municipal Regulations. Great Britain being without a prize code had no prize regulations on the subject although it has long been an established rule of English municipal law that the nationality of a company is that of its place of business or incorporation, that is, its domicile. The German prize code, as in force July 1, 1915, made the nationality of the owner the test of the enemy or non-enemy character of goods found on board an enemy vessel.[1] During the early part of the war the nationality of ships was determined by Article 57 of the Declaration of London, that is, by the flag which they were entitled to fly. But by an amendment (Sec. 11a) to the German prize code, made by an ordinance of July 16, 1917, issued as an act of reprisal against Great Britain, it was provided that *ships* when owned by corporations having their *siège social* in enemy country, or the shares of which were in major part in the possession of enemy subjects, or the affairs of which were managed by enemy subjects, should be treated as enemy ships. This rule, however, was not applied to the determinatoin of the nationality of corporations which were owners of *goods*.[2]

The Chinese regulations made no distinction between ships and goods and, following the English rule, made the nationality of the company depend upon its domicile, that is, upon the place where its principal office was situated.[3] The American Instructions for the Navy of June 1917 made the neutral or enemy character of goods found on board an enemy vessel depend upon the neutral or enemy commercial domicile of the owner, whether the owner be an individual, a firm, or a corporation.[4] The French "Instructions" of 1912 (revised in 1916) and the Italian "Rules" of 1917 contain no pronouncement on the subject. The Portuguese decree of April 20, 1916, declared, somewhat indefinitely, to be enemy companies those which were considered as nationals of an enemy State.

[1] Sec. 20 b, Huberich and King, *The German Prize Code*, p. 15.
[2] See the case of the *Haelen*, II *Entsch.* 177.
[3] Regulations governing capture at sea, Art. 5, *Judgments of the High Prize Court of China*, p. 137.
[4] Art. 59.

Sec. 378. English Cases. The "Derflinger No. 4." The British Prize Courts naturally were most frequently called upon to decide the question of the enemy or non-enemy character of companies whose ships or goods had been seized, and their decisions contain the fullest and most instructive discussions of the law and jurisprudence. The first and one of the most difficult cases of the kind was that of the *Derflinger No. 4*[1] (Prize Court for Egypt), which involved the liability to capture of goods belonging to a firm registered in Japan consisting of six German members, of whom four resided in Japan and two in Germany. The firm was registered as a *Goshi Kwaisha* or limited partnership, which by Japanese law was a separate and distinct entity, apart from its members, and possessed Japanese nationality. The claimants asked for the release of the goods on the ground that they were the property of a Japanese company having Japanese nationality. The procurator for the Crown contended, on the contrary, that the firm was a German partnership and that the shares of the German partners who resided in Germany should be confiscated as was done in the case of the *Clan Grant*.[2] The Prize Court adopted the view of the procurator and condemned the shares of the German partners on the ground that a Japanese *Goshi Kwaisha* does not have all the attributes of a British company but is merely a registered partnership and hence the shares of the different members in the goods must be treated as the shares of the partners. In the course of his opinion Judge Grain said:

"Mr. Booth, who appears on behalf of Winckler & Co. [the Japanese Co.], maintains that a partnership which is registered as a *Goshi Kwaisha* in Japan is a corporation with a separate entity, and must be treated as a Japanese company carrying on business in Japan, and not as a German partnership firm. In support of this contention he puts in an affidavit in which is stated: 'According to the law of Japan, a *Goshi Kwaisha* (or limited partnership) when duly registered in accordance with the commercial code of Japan becomes a juridical person or corporation of a separate and distinct entity apart from its respective members, and it is recognized by the law of Japan as of Japanese nationality.' The first point to be decided is whether I am to decide this matter wholly by reference to the law of Great Britain or in part by reference to the law of Japan. Dicey, in his *Conflict of Laws*, states: 'The principle is now well established that a corporation duly created

[1] II Br. & Col. Pr. Cas. 102.

[2] *Supra*, Sec. 344. In this case it will be recalled that the Prize Court confiscated two-thirds of the goods owned by a company doing business at Khartoum and in which two of the three partners were Germans resident in Germany.

in one country is recognized as a corporation in other countries'; and I feel sure that if the registration of a partnership as a *Goshi Kwaisha* does confer on that partnership all the attributes of a British company in Great Britain I am bound to deal with it accordingly. The word 'Kwaisha' (company) in Japan seems to be used in a very broad sense, as meaning merely an association of persons for the purpose of trade or otherwise."

Sec. 379. Case of the "Eumaeus." The same view was adopted by Sir Samuel Evans in the case of the *Eumaeus*,[1] where he held that a firm consisting of two British and two German subjects (the latter residing in Germany), carrying on business at Shanghai and registered at the German consulate, was a German firm and that the shares of the German partners in the goods belonging to the firm and which had been seized as prize must be condemned. As to the shares of the British partners, the decision was adjourned for further evidence as to what measures, if any, were taken by them to sever their connection with the firm on the outbreak of the war. Referring to the status of the firm Sir Samuel said:

"Having regard to the establishment of registration of the firm of Arnhold Karberg & Co., in Shanghai, as a German firm, subject to German laws under treaty with China, and with exterritorial rights and privileges, I am of opinion that the firm should be treated in all matters relating to the jurisdiction of a Prize Court in time of war as if it were established in Germany itself. In other words, the business at Shanghai must be regarded as enemy business carried on in an enemy house of trade.

"A similar result must, in my view, follow from a consideration of the position of the firm, not as a separate entity, as was contended, but from the more accurate position of a partnership of the four individual partners. They, although subjects of different States, agreed to carry on the business in co-partnership in Shanghai, and as such were the joint owners, in varying shares or proportions, of the goods now claimed."

Sec. 380. Case of the "Poona." The question of the status of a company registered in Great Britain and of which the shareholders and directors were persons of enemy nationality first came before the British Prize Court in March, 1915, in the case of the *Poona*.[2] The goods were claimed by the consignees, a company domiciled and registered in London but virtually all the shares of which were owned by Germans resident in Germany and the directors of which were Germans. The claimants contended that the company was English by nationality and hence

[1] IV Lloyd 270; I Br. & Col. Pr. Cas. 605. See also Secs. 348, 360, *supra*.
[2] II Lloyd 291; I Br. & Col. Pr. Cas. 275.

its goods were not confiscable. The Crown, on the other hand, argued that as all the directors and shareholders were either enemy subjects or resident in Germany the goods were in reality the property of enemy persons and as such ought to be condemned. Sir Samuel Evans had already held in the case of the *Roumanian*[1] that as regards a company [the Petroleum S. S. Co.] incorporated in England, the vast majority of the shares in which were owned by a German company, was an English company, nevertheless, and that a company incorporated in Bremen [the Europäische Petroleum Union Gesellschaft] must be regarded as a German company for prize purposes, although 90 per cent of its shares were held by neutral and allied subjects. Likewise the Court of Appeal in the *Continental Tyre and Rubber Co. v. Daimler Co.*[2] had held that a company incorporated in England practically all the shares in which were owned by German subjects resident in Germany, was an English company, being a separate and distinct entity from the shareholders who composed it. In the Daimler case Mr. Justice Buckley, however, dissented in a vigorous opinion in which he said that "the artificial legal person called the corporation had no physical existence"—neither "body, parts nor possessions"; that apart from its corporators, it could have neither thoughts, intentions or mind, other than the minds of the incorporators. The nationality of the company in question should therefore be treated as that of the incorporators."

Sir Samuel held that the goods consigned to the British company were not confiscable by reason of the fact that all the directors and shareholders were enemy subjects or persons domiciled in enemy country. In the course of this judgment he said:

"I was referred to my decision in this Court in the *Roumanian* and, of course, to the judgments pronounced later by the Court of Appeal in *Continental Tyre &c. Co., Lim. v. Daimler Co., Lim.* and *v. Thomas Tilling, Lim.* (84 L. J. K B. 926; (1915) 1 K. B. 893).

"I will only observe as to the *Roumanian* that it does not necessarily govern this case. The facts there were different in important and material respects; moreover, I think it will be found that in the course of the arguments in the *Roumanian* counsel for the claimants expressly admitted that the Europäische Petroleum Union Gesellschaft M. B. H. of Bremen was a German company; and the case was dealt with accordingly. The judgments in the Court of Appeal in the Continental Tyre Co. cases, however, bear directly upon the point arising in the present

[1] I Lloyd 191; I Br. & Col. Pr. Cas. 75.
[2] 1 K. B. 893 (1915). Discussed in my *International Law and the World War*, Vol. I, p. 218.

case. What, therefore, ought I to do in this Court in view of those decisions?

"In matters relating to prize, the Court of Appeal does not bind this Court, for the reason that no appeal lies to the Court of Appeal from judgments given in the Prize Court. The only appellate court in such cases is the Judicial Committee of the Privy Council.

"If I were of opinion that different principles applied in the present proceedings in a Court of Prize, or if I held a strong opinion upon the legal aspects, even if the same principles were applicable, I conceive it would be my duty to give effect to such opinion, even though it differed from that of the Court of Appeal. But I do not think in the present case different principles ought to be applied. The matter in controversy appears to me to be one which should be regarded from the point of view of municipal law; and no question of an overriding principle of international law arises.

"The claimants came forward as a company incorporated in accordance with the law of this country. The claim is not made by the individual shareholders—subjects of a foreign country, enemy or otherwise. The question turns upon the status of the company in this kingdom. Accordingly, nothing in this case depends upon the bearing of the law of nations upon our municipal law.

"In these circumstances, I think it more respectful to the Court of Appeal to act in accordance with their judgment, however much I might feel inclined to sympathise with the dissentient views of Lord Justice Buckley.

"In the special facts of this case and of the Continental Tyre Co. cases a decision in accordance with Lord Justice Buckley's judgment might be easy; but it is fairly obvious that with even a slight variation of facts as to the holding of the shares, the adoption of a definite general principle as a foundation for his judgment and its application would give rise to great difficulties.

"Without dealing with it any further, I may observe that even in Lord Justice Buckley's dissenting judgment this passage is to be found:

" 'The corporation, if it be a British corporation, stands in the same position for most purposes as a British subject. For instance, as regards right of ownership of property and the right to protection and assistance by the law. But while it stands for most purposes in the position of a British subject it cannot, I think, be correctly described as a British subject.'

"The question before me deals with 'rights of ownership.' For the reasons stated, I am content to accept respectfully the law as laid down by the Court of Appeal, and must leave the ultimate decision to a higher tribunal.

"If the judgment of the majority of the Court of Appeal is unsound, it must be so pronounced by the House of Lords on appeal from them; or by the Privy Council on appeal from this Court. If it is affirmed as good law, but is considered to require alteration as a matter of just policy, then the Legislature must act."

Sir Samuel added, however, a word of reservation to the effect that the rules governing the ownership of vessels being very

special in character, he wished to repeat what he had said in the case of the *Tommi and Rotherstand*,[1] namely that it was not to be assumed that the Prize Court could not say, looking at the realities of the thing, that ships owned by a British company in which the shareholders were Germans, were not German ships.

Sec. 381. Cases of the "Michigan" and the "St. Tudno." In the above mentioned case (the *Poona*) Sir Samuel Evans, out of deference to the opinion of the Court of Appeal, had acted in accordance with its judgment, though he stated that had he entertained a different view of the status of the company he would have considered it his duty to give effect thereto. But later, after the decision of the Court of Appeal had been reversed by the House of Lords,[2] and a similar case involving the status of a company registered in Great Britain, all except six of the shares of which were held by a German corporation, came before Sir Samuel, he altered his judgment to conform to that of the House of Lords.[3] Referring to the circumstances he said:

> "In the case of the *Poona*, I described exactly the constitution of the company. I need not repeat what I there said. The company have not put forward any claim to the goods in these proceedings, although they sent a letter to the Procurator-General alleging they were the owners, and that as a company registered in this country they were entitled to have the goods released to them as they were in the case of the *Poona*. I followed the judgment of the Court of Appeal in *Continental Tyre & Rubber Company (Great Britain), Ltd.* v. *Daimler Co.*, and said that if the judgment of the Court of Appeal was unsound it must be so pronounced by the House of Lords. It has been pronounced to be unsound by the House of Lords, and following that decision and my own inclination as already expressed in the *Poona*, I hold that this company for all purposes affecting this case must be regarded as an enemy company, although carrying on business here, and the property must be condemned as enemy property."

Sir Samuel adopted the same view in the case of the *St. Tudno* [4] where he held that a vessel registered as a British ship and owned by a company incorporated in England but the real owners and controllers of which was the Hamburg-Amerika Line must be regarded as a German ship. He said he thought a Prize Court had a right and was bound "to look at something beyond the nominal ownership." There were, he said, three British directors of the company and some British shareholders but the directors were "bound hand and foot" by the Hamburg-Amerika

[1] II Lloyd 1; I Br. & Col. Pr. Cas. 16. See Sec. 307, *supra*.
[2] [1916] 2 A. C. 307. [3] The *Michigan*, V. Lloyd 421.
[4] V Lloyd 198; II Br. & Col. Pr. Cas. 272. See also Sec. 286, *supra*.

Line and there was "not a single person other than the Hamburg-Amerika Line that had a penny of interest in the ship." Reliance was had on the decision of the House of Lords in the *Daimler Co.*, from which, he said, "it was quite clear . . . that the place of the registered office of the company does not determine the principal place of business" and that the element of control was of capital importance. The Attorney-General in support of the right of the Prize Court to look beyond the nominal ownership, especially in the case of a ship flying the British flag, had also relied on the recent case of the *Polzeath*,[1] where the Court of Appeal declared forfeit to the Crown a vessel, because, although owned by a British company, the principal place of business of the company was in Hamburg.[2]

As already pointed out in another place,[3] the British Prize Court in the case of the *Hamborn* applied the same rule to a company registered in a neutral country and held that a company registered in the Netherlands, the shares of which were owned by enemy subjects and whose business was wholly under enemy control, must be regarded as an enemy company so far as the liability of its ships to capture was concerned.[4] The

[1] [1916] 85 L. J. R. 245.

[2] The jurisprudence of the British courts, civil and prize, relative to the status of companies, especially from the point of view of the place of registration and the nationality of their shareholders and directors is analyzed by Mr. A. D. McNair in an article entitled "The National Character and Status of Corporations," in the *British Year Book of International Law*, 1923-24, pp. 44 ff. Regarding the doctrine of the Daimler case Mr. McNair concludes that "the vital point of the doctrine is that, just as a natural person, a British or a neutral subject, may become affected with enemy character by the occurrence of certain events, so the same thing may happen to the artificial legal entity known as a corporation which has been incorporated under the law of this country." It may be observed that the American courts have in several cases refused to follow the decision of the House of Lords in the Daimler case. See the cases cited in my *International Law and the World War*, Vol. I, p. 227.

[3] *Supra*, Sec. 281.

[4] But in the case of the *Noordam* (III Br. & Col. Pr. Cas. 488), where it was argued on behalf of the American Express Co. of New York as claimants in the Prize Court in respect of certain bonds seized in transit to New York from the American Express Co. of Berlin, that the latter company although registered in Germany was an American company because 99 per cent. of the shares were owned by American citizens and the other one per cent. by British subjects and that therefore according to the decision of the House of Lords in the Daimler Co. the Court should look behind the legal entity of the company registered at Berlin and ascertain who were the really controlling persons, Lord Sterndale refused to do this because he said the decision in the Daimler case was not applicable in this case. The House of Lords, he said, held that "for one purpose at any rate and perhaps for some others the Court must look behind the legal entity and determine who are the real controlling persons." But it was not necessary in this case because the judgment of Lord Parker "expressly excepted from the operation of that principle the question of property." The question here being one of property unlike that of the *Hamborn* the Daimler doctrine was

Judicial Committee of the Privy Council in the case of the *Vesta and Other Vessels* [1] adopted this view and held that a company registered at Rotterdam the shares in which and the control of the business of which were in the hands of enemy subjects, was an enemy company.

Sec. 382. Status of Goods the Produce of Enemy Soil. The old Anglo-American rule that the produce of enemy soil is regarded as enemy property regardless of the enemy or non-enemy character of the owner was applied by the British Prize Court in the case of the *Asturian.*[2] In this case the *Banque d'Orient,* a Greek company with its head office at Athens and a branch at Smyrna, shipped on a British steamer a quantity of sultanas grown in its own vineyard in Turkey (enemy country, to Great Britain), and consigned to their order at Liverpool. Being seized as prize they were condemned by Sir Samuel Evans on the ground that being the produce of land situate in enemy country they must be confiscated as enemy property, although shipped before the outbreak of the war. In the course of his judgment Sir Samuel said:

"The argument on their behalf was, in the main, based upon their alleged neutral domicile, as their head office was in Athens and the business at Smyrna was that of a mere branch, in relation to which it was said that they had the benefit of the privileges of the Turkish capitulations system. Under this system they claimed that their position in Smyrna, and their character as owners of the vineyard, was that of neutral subjects of the Kingdom of Greece. In that regard much of the argument before me revolved round the questions of commercial domicile, and the effect of the Turkish capitulations, and their alleged abolition before the war by the Sublime Porte.

"In the view I take of this case all such questions are irrelevant. The simple fact upon which the decision of the Court depends is that the goods claimed were the produce of land owned or held by the claimants in an enemy country. The law applicable is well settled—namely, that the produce of such land, while in the possession or ownership of the person holding or owning such land, even although he be a neutral and resident in a neutral country, is confiscable if captured or seized by a

not applicable. Nevertheless, the goods were released on the ground that they were held to have never been the property of the Berlin house.

Compare also the *Kankakee, Hocking,* and *Genesee* (VIII Lloyd 74), where three vessels nominally owned by a company incorporated in the United States and flying the American flag were condemned on the ground that they were in fact owned wholly or in part by German subjects. As to these cases see *supra,* Secs. 284, 322.

[1] X Lloyd 126; III Br. & Col. Pr. Cas. 897. See also the judgment of Sir Samuel Evans in the case of the Vulcan Coal Company (VIII Lloyd 146, note 1), holding that a company incorporated in the Netherlands but the shares in which were owned by enemies and which was under enemy control, was an enemy company.

[2] V Lloyd 216; II Br. & Col. Pr. Cas. 202. See also Sec. 118, *supra.*

belligerent with whom the State where the land is situate is at war. This doctrine was declared as long ago as 1803 to have been so repeatedly decided, both in the English Prize Court and in the Court of the Commissioners of Appeal in prize cases, that it was no longer open to question or discussion—see the *Phœnix* (1803), (5 C. Rob. 20; 1 Eng. P. C. 459 n.). It was also fully adopted and indorsed by the Supreme Court of the United States of America in *Thirty Hogsheads of Sugar* (or Bentzen) *v. Boyle* (1815), (9 Cranch (Amer.), 191; Scott's *Cases on Inter. Law* 598).

"This doctrine has not been doubted, and still remains in full force as part of the law of nations. It is well stated by the late Mr. Hall in the last edition of his work on *International Law* in this passage: 'Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held, being fixed, is necessarily associated with the permanent interests of the state to which it belongs, and its proprietor, so far from being able to impress his own character, if he happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which cannot be moved into identification in respect of it with its national character. The produce of such property therefore is liable to capture under all circumstances in which enemy's property can be seized.'—*Hall's International Law* (6th ed.), p. 497.

"The fact was relied upon by the claimants that the shipment of the goods was before the state of war existed between this country and Turkey. Upon the principle enunciated in the above passage from Mr. Hall this fact does not affect the question of the confiscability of the goods; and, indeed, it was expressly declared by Sir William Scott in the *Vrow Anna Catharina* (1804), (5 C. Rob. 161, p. 167) that the produce of land in an enemy country was subject to confiscation although shipped in time of peace."

It was on a somewhat analogous principle that the Prize Court at Malta in the case of *Turkish Moneys Taken at Mudros*,[1] confiscated a quantity of coin and bank notes of the Imperial Ottoman Bank in the possession of two Greek money lenders and seized of them while on board a French steamship while *en route* to Constantinople for the purpose of changing the Turkish money into Greek money. The money was confiscated not because it was the "produce" of enemy soil but on the analogous principle that it had a "hostile commercial or trade domicile." "Consequently," said the Court, "the goods in question, if afloat, could be legally seized, whoever might be the owner thereof. The place of seizure is important. The goods were afloat on a French steamer, which for all purposes of law is a British steamer, the French being our allies. Consequently enemy goods afloat on board an allied ship have been seized, and as enemy goods, are subject to condemnation."

[1] II Br. & Col. Pr. Cas. 336.

Sec. 383. German Decisions. Continental cases involving directly the question of the nationality of *goods,* as contradistinguished from *ships,* belonging to commercial companies appear to be almost lacking. There were a few German decisions such as the *Lestris* [1] from which certain conclusions may be drawn regarding the status of houses of trade. Among them are: that a branch house of a neutral company must be regarded as neutral even if established in enemy country provided it is not a corporation (*juristische Person*) and that a firm consisting of a single person established in enemy country must be regarded as neutral if this person is neutral by nationality.[2] By Article 20b of the German prize ordinance goods belonging to a corporation (*juristische person*) are regarded as enemy or neutral according as the domicile of the corporation is situated in enemy or neutral country. In the case of the *Eskimo* [3] the claimant was a company having its head office at Manchester and a branch in Norway. The goods claimed had been shipped from the latter to the former. The German Supreme Prize Court held that where a company had a house in both enemy and neutral country, as was the case here, the goods must be treated as enemy property if they were intended for the house in enemy country.

As already pointed out above, Germany by an amendment to her prize ordinance, added July 16, 1917, provided that corporations, as distinguished from companies and partnerships, should be treated as enemy societies if they had their head office in enemy country, or the shares were held in major part by enemy subjects. But in the case of the *Haelen* [4] the Supreme Prize Court held that this amendment applied only to ships and not to goods. Thus German jurisprudence originally made a distinction between corporations which were owners of ships and those which were owners of goods. In the latter case only, would the Prize Court go behind the nationality of the corporation resulting from the situation of its head office and inquire into the nationality of its shareholders and directors. But after the adoption of the amendment of July 16, 1917, to the prize ordi-

[1] II *Entsch.* 207; Fauchille et Basdevant, *Jurispr. All.* 302. One question here raised was whether goods found on board the *Lestris* which had been shipped to the claimant Cohen and Van der Laan of Rotterdam (or Haarlem) by Cohen and Van der Laan of London, the latter being a branch house of the former, were liable to capture. The goods were held to be neutral property.

[2] Compare Verzijl, *op. cit.*, p. 543.

[3] I *Entsch.* 382; Fauchille et Basdevant, *Jurispr. All.* 292.

[4] II *Entsch.* 177.

nance, the Prize Court followed the practice of going behind the *siège social* of companies owning ships and of investigating the nationality of the shareholders and directors.

Decisions of the French Prize Council regarding the nationality of houses of trade were equally scarce. Nevertheless, references in various cases to the nationality of the claimants warrant the conclusion that the French Prize Council generally regarded the *siège social* of the house as determining its nationality.[1] The French civil courts, however, in determining the nationality of houses of trade in connection with the trading with the enemy legislation and decrees did not hesitate "to go to the bottom of things" and ascertain their real character by inquiring into the nationality of their shareholders and directors.[2]

[1] See notably the *Czar Nicholai II* (Fauchille, *Jurispr. Franc.* 10); the *Ferd Laeisz* (*ibid.*, 202); the *Flamanville* (*ibid.*, 113), and others.

[2] See my *International Law and the World War*, Vol. I, pp. 224 ff., where the French practice and jurisprudence are reviewed.

CHAPTER XIII

CONTRABAND OF WAR

I

General Principles

Sec. 384. Importance During the World War. Questions involving contraband of war were the subject of a larger number of decisions by the Prize Courts during the late war than any other. The decisions run well into the hundreds and they deal with every conceivable aspect of the subject. On account of the pressing need for foodstuffs and other supplies from abroad which all the belligerent countries experienced and the high prices which they commanded, the traffic in contraband reached an extensive scale. In order to prevent their enemies from obtaining such supplies each belligerent adopted rigorous measures of repression, sometimes in contravention of the traditional views and practice which it had hitherto maintained and followed. Due to the fact that Germany, the principal belligerent on one side, was partially flanked by a group of neutral States, some of which possessed seaboards through whose ports, had they not been intercepted by exceptional measures, supplies could have been freely obtained, the problem of dealing with contraband raised serious difficulties for England and France and caused them to resort to measures which neutrals considered to be a grave infringement of their rights. The problem was further complicated by the existence of an unprecedented situation in which it was practically impossible to distinguish between supplies intended for the civilian population of the enemy country and those intended for the armed forces, and this situation was intensified by the establishment of a system of government control, especially in Germany, of the distribution of foodstuffs and other supplies. The situation was still further complicated by the fact that during the late war it was found that many articles hitherto unadapted to military uses and not therefore treated as

contraband were susceptible of extensive military use. Thus it came to pass that the old distinction between absolute and conditional contraband largely disappeared.

Sec. 385. Carriage of Contraband No Violation of International Law. While the capture and confiscation of contraband of war, whoever the owners and whatever the nationality of the ship on which it is laden, is a lawful belligerent right recognized both by the customary and the conventional law of nations, those who engage in the transportation of it either as shippers or carriers, are not deemed to be violators of the law and the confiscation of it by the captor is not regarded as a penalty for the commission of an offence. This principle was admitted and frequently asserted by the Prize Courts during the World War. In the case of the *Kim and Other Vessels No. 1*,[1] Sir Samuel Evans declared that neutrals were within their rights in endeavoring to send both conditional and absolute contraband to the enemy; that it was no crime to do so and that the only liability they incurred was the risk of capture. In the case of the *Alwina*[2] he pointed out that the terms "offence" and "penalty" often used in referring to the act of transporting contraband and the confiscation which resulted from capture were incorrectly used, but he added that the use of such terms did no harm so long as it did not produce confusion of thought. In the *Kronprinsessan Margareta and Other Vessels*[3] the Judicial Committee, adverting to the use of the terms "penalty" and "punishment" observed that they were "unsuitable terms" since their use might seem to cast doubt upon the right of neutrals to ship or sell contraband.[4] Traffic in contraband goods, though often spoken of "as if it were a guilty departure from the neutral duty of impartiality, is now well recognized as being in itself no transgression of the limits of a neutral's duty, but merely the exercise of a hazardous right, in the course of which he may come into conflict with the rights of the belligerent and be worsted." In the case of the *Prinz der Nederlanden*[5] Lord Sumner, adverting to the use of the term "penalty" in connection with the confiscation of contraband, said:

[1] III Lloyd 167; I Br. & Col. Pr. Cas. 405.
[2] V, *ibid.*, 127; II, *ibid.*, 186. [3] VIII, *ibid.*, 241; III, *ibid.*, 803.
[4] Compare also the observations to the same effect of the Judicial Committee in the *Louisiana and Other Vessels* (V Lloyd 248), where Lord Parker said: "It is well to bear in mind that, according to international law, neutrals may, during a war, trade freely as well with the belligerents as with other neutrals."
[5] VI Lloyd 208; III Br. & Col. Pr. Cas. 951.

"The term penalty, however, although often mentioned—for example, in the *Commercen* (1 Wheaton, at p. 394)—is not in this connection really one which implies that the carriage of contraband is attended with the usual incidents of the commission of an offence. Neutrals who carry contraband do not break the law of nations; they run a risk for adequate gain, and, if they are caught, they take the consequences. If they know what they are doing, those consequences may be very serious; if they do not, they may get off merely with some inconvenience or delay. This must suffice them."

The liability of contraband to capture is, of course, not affected by the nationality of the owner or that of the ship on which it is transported. By the express terms of the Declaration of Paris, the immunity which it establishes in favor of enemy goods on neutral vessels and of neutral goods on enemy vessels does not apply to contraband of war. Such goods are therefore liable to capture regardless of the nationality of the vessel in which they are laden. While contraband is usually carried on neutral vessels, it may be carried equally on vessels flying the flag of the captor state or that of an ally.[1]

Sec. 386. Distinction Between Absolute and Conditional Contraband. The customary law of nations, and the Declaration of London which was understood to be merely declaratory of the custom and practice on this point, recognized a distinction between goods which were susceptible exclusively of military use and those which were susceptible of use both for military and civil purposes. But by measures put into effect by most of the belligerent powers during the World War the distinction was practically done away with, all articles of a contraband character being inserted in a single list and the same rule regarding hostile distinction and liability to capture being applied without regard to their difference of character.[2]

[1] See among others, the French cases of the *Cotenten* (Fauchille, *Jurispr. Franc.* 299), the *Narrovian* (*ibid.*, 68), and the *Kirkoswald* (*ibid.*, 441).

[2] Sir Edward Grey, in a communication to the American Ambassador at London, dated Feby. 10, 1915 (*Supp. to 9 Amer. Jour.* 78), said: "Your Excellency will no doubt remember that soon after the outbreak of war an order of His Majesty in Council was issued under which no distinction was drawn in the application of the doctrine of continuous voyage between absolute contraband and conditional contraband, and which also imposed upon the neutral owner of contraband somewhat drastic conditions as to the burden of proof of the guilt or innocence of the shipment."

The decrees and orders of the various belligerent governments by which the distinction was in effect done away with are listed in Verzijl, *op. cit.*, p. 735. By a proclamation of April 19, 1916, the British government abandoned the distinction and issued a single list embracing several hundred articles arranged alphabetically which it proposed to treat as contraband without regard to whether they were, according to former tests, absolute or conditional contraband. Other governments followed the example of the British government. The lists of contraband published from time to time may be

The "free list" of the Declaration of London was likewise disregarded; many articles on the list were declared to be contraband [1] and the Prize Courts frequently condemned such goods.

Nevertheless, the Prize Courts appear to have never abandoned entirely the theoretical distinction. Many of the German decisions in fact turned upon the question of whether particular articles were absolute or conditional contraband according to the Declaration of London.[2] Even the Prize Courts of Great Britain, where the distinction had been most completely abandoned by Orders in Council, did not in reaching their conclusions always ignore the traditional difference between the two classes of contraband. Thus in the case of the *Louisiana and Other Vessels*,[3] in which the liability to capture of certain cattle fodder stuffs was involved, we find Lord Parker saying in 1918: "Fodder stuffs are not absolute contraband. They are conditional contraband only—that is to say, they cannot be condemned as lawful prize unless destined for the enemy government or the enemy's naval or military forces." And he added: "A belligerent state is entitled to seize the contraband goods in transit on reasonable suspicion that, being in their nature *absolute* contraband, they are destined for the enemy country, or being in their nature *conditional* contraband, they are destined for the enemy government or the enemy naval or military forces." [4] This was the traditional view and it was the principle embodied

found in the *Special Supplement to the American Journal of International Law*, Vols. 9 (1915) and 10 (1916), pp. 9 ff. and 14 ff., respectively; also in the white book issued by the Department of State of the United States entitled *Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Commerce*, No. 1, pp. 5 ff., and No. 3, pp. 89 ff. In explanation of its course, the British Foreign Office (Feby. 10, 1915), stated: "The circumstances of the present war are so peculiar that His Majesty's government consider that for practical purposes the distinction between the two classes of contraband has ceased to have any value. So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war that no real distinction can now be drawn between the armed forces and the civilian population. Similarly, the enemy government has taken control, by a series of decrees and orders, of practically all the articles on the list of conditional contraband, so that they are now available for government use. So long as these exceptional conditions continue our belligerent rights with respect to the two kinds of contraband are the same and our treatment of them must be identical." As to the breakdown of the distinction between absolute and conditional contraband, see also Richards, *British Year Book of International Law*, 1920-31, pp. 19 ff.

[1] As to the details see my *International Law and the World War*, Vol. II, p. 286.

[2] A long list of such decisions are cited in Verzijl, *op. cit.*, pp. 739 ff.

[3] V Lloyd 248; III Br. & Col. Pr. Cas. 60.

[4] A similar view was expressed in the same year by the German Supreme Prize Court in the case of the *Pomona* (II *Entsch.* 147).

in the Declaration of London, although the rule had been set aside by an Order in Council.

Sec. 387. Necessity of Hostile Destination. It goes without saying that to be confiscable as contraband the goods must be destined to the enemy. Lord Sterndale, in the case of the *Dirigio and Other Vessels*,[1] adverting to the argument of the Crown that it was sufficient according to the Declaration of Paris that goods be on the list of contraband, said he could not accept this argument; it was necessary, he added, that they should have a hostile destination.

The Declaration of London in laying down a rule as to what constitutes hostile destination, as is well known, made a distinction between absolute and conditional contraband; the former was declared to be liable to capture when it is destined to *territory* belonging to or occupied by the enemy, or to the armed forces of the enemy,[2] the latter when it is destined for the *use* of the armed forces, or of a government department of the enemy state (unless in the latter case the goods are not to be used for war purposes.)[3] In the former case it is the place or the character of the consignee which determines the liability; in the latter it is the use to which the goods are to be put. In the cases which came before the Prize Courts involving the liability to capture of absolute contraband, the destination in fact was usually enemy territory and only rarely the armed forces of the enemy.[4] In those involving the liability to capture of conditional contraband the Prize Courts, in theory at least, maintained that the destination must show intended use by the enemy government or its armed forces,[5] but the presumptions of such

[1] VIII Lloyd 395; III Br. & Col. Pr. Cas. 452.
[2] Article 30. [3] Article 33.
[4] Such a case, however, was that of the *Angelike* and *Athènes* (Fauchille, *Jurispr. Franc.* 428), where the French Prize Council condemned a quantity of paraffin seized on board a neutral ship and destined to the enemy naval forces on the coast of Crete where the Germans had organized a base of supplies for their submarines. But in the case of the *Joannina* (*ibid.*, 305), the Council released certain goods destined to Mytilene and Chio, on the ground that neither place was occupied by the enemy.
[5] Thus in the case of the *Kim and Other Vessels*, Sir Samuel Evans, after having reached the conclusion that the cargoes, consisting of conditional contraband, were destined to Germany, said, "The question remains whether their real ultimate destination was for the use of the German government or its naval or military forces." If not intended for such use they would apparently have had to be restored. But this was before the proclamation of April 16, 1916, which announced that the government would henceforth treat the two kinds of contraband identically. Apparently, after that date there was no need for the Prize Court to concern itself with the question of the possible use to which conditional contraband goods were intended to be put.
See also the case of the *Alfred Hage* (I *Entsch.* 25), where the German Prize Court recognized in theory at least the distinction between the rules

intended use, laid down by the Declaration of London, or the new ones introduced by the belligerent governments were so numerous that destination to enemy country was usually interpreted to mean destination for the use of the government or the armed forces. Thus in practice the distinction between the rules governing hostile destination in respect to the two sorts of contraband came to be largely illusory. In short, all contraband goods going to enemy country, whether absolute or conditional, were presumed to be for the use of the government or its armed forces.

Sec. 388. The Doctrine of Continuous Voyage. As is well known, the Declaration of London sanctioned the doctrine of continuous voyage in respect to the carriage of absolute contraband (art. 30), but it did not admit the doctrine as applied to the transportation of conditional contraband, except where it was destined to an enemy country which had no sea board (Arts. 35 and 36). But the Declaration never having been ratified, various belligerent governments, notably those of Great Britain and France, put it into effect with modifications which practically did away with the distinction between the two classes of contraband and subjected both to the same treatment.[1] Germany,

governing hostile destination in respect to the two kinds of contraband and left the inference that conditional contraband would not be condemned unless it was destined for the use of the enemy government or its armed forces.

To the same effect see the French cases of the *Oranje Nassau* (Fauchille, *Jurispr. Franc.* 77) and the *Bormida* (*ibid.*, 470), where in both cases the reason assigned for the condemnation of certain conditional contraband was that it was destined for the use of the enemy government or its armed forces. The council added that in order that such goods should be treated as contraband it must be shown that they were destined not only to enemy territory but for the use of the enemy government or the armed forces. In the latter case it was held that destination to an enemy port (Tripoli) around which were assembled numerous troops must be regarded as destination to the armed forces.

[1] Sec. 386, *supra*. This was done in large measure by a British Order in Council of October 29, 1914, by an order of March 30, 1916, which declared that the former order "should not be deemed to have limited in any way the right of His Majesty in accordance with the law of nations to capture goods upon the ground that they are conditional contraband, nor to affect or to have affected the liability of conditional contraband to capture, whether the carriage of the goods to their destination be direct or entail trans-shipment or a subsequent transport by land"; and finally by a proclamation of July 7, 1916, abrogating all previous Orders in Council, putting the Declaration of London in effect, and extending the doctrine of continuous voyage to the carriage of all contraband without restriction. The French government did likewise by decrees of Nov. 6, 1914, and July 7, 1916; Italy by "instructions" of July 15, 1915, and by the adoption of Rules Relative to Capture March 25, 1917; Portugal by a decree of August 14, 1916; and Russia by ukases of Sept. 14, 1914, and Dec. 21, 1914.

As to the attitude of the belligerent governments on the subject see my work cited, Vol. II, pp. 297 ff., and Verzijl, *op. cit.*, Sec. 443. The history of the origin, development and recent extensions of the doctrine of continu-

by way of reprisal, amended her prize ordinance in the same sense. The position taken by the British government was that the Declaration of London in excluding the application of the doctrine of continuous voyage from the carriage of conditional contraband had altered the existing customary rule of international law. As to this, Sir Samuel Evans, in the case of the *Kim*,[1] said:

> "I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage or transportation, both in relation to carriage by sea and to carriage by over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognised legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare."

The purpose and effect of the Orders in Council in putting the Declaration into effect with modifications and finally abrogating it in its entirety was therefore to prevent the alteration which the Declaration had attempted and to restore the customary rule of international law.

In the case of the *Kim and Other Vessels*, Sir Samuel Evans, referring to the effect of the Order in Council of Oct. 29, 1914, on the Declaration of London,[2] said:

> "It is true that in a matter of real substance it alters the proposed compromise incorporated in Article 35 of the Declaration of London, whereby, if the Declaration had been ratified, the doctrine of continuous voyage would have been excluded for conditional contraband. The provision in Article 35 was described by Sir Robert Finlay [counsel for several of the claimants] as, 'An innovation in international law as hitherto recognized in the United States and by Great Britain and other States, introducing an innovation of the first importance by excluding the doctrine of continuous voyage in the case of conditional contraband.'
>
> "What the Order in Council did, therefore, was to prevent the innovation. In this regard it therefore proceeded not in violation of, but upon the basis of, the existing international law upon the subject.
>
> "It may be well to note, and to record, that at the London Conference which produced the Declaration, all the allied Powers engaged in this war, and also the United States, had been in favour of continuing to apply the doctrine of continuous voyage or continuous transportation to conditional as well as to absolute contraband, a doctrine which, as we have seen, was nurtured and specially favoured by the courts of the United States."

ous voyage is reviewed in a monograph by Dr. H. W. Briggs, entitled "The Doctrine of Continuous Voyage" (1926).

[1] III Lloyd 167; 1 Br. & Col. Pr. Cas. 485.

[2] See the quotation from Lord Parker in the case of the *Louisiana* (Sec. 419, *infra*); V, *ibid.*, 248; III, *ibid.*, 60.

Sec. 389. Contraband May Include Property Transported in the Mails. During the late war, governments and Prize Courts were, apparently for the first time, called upon to determine whether goods carried not as ordinary cargo but in the parcels mail might be seized and condemned as contraband. When in consequence of the allied measures against commerce with Germany her overseas trade had been largely destroyed, the Germans undertook to avoid the Anglo-French restrictions in respect to blockade and contraband, through resort to the postal service for procuring supplies from abroad and for exporting to overseas countries goods which they desired to sell abroad. Toward the end of the year 1915, their exploitation of the postal service had assumed such proportions that the British and French governments adopted the policy of intercepting, taking into port and examining the mails of neutral steamers proceeding to or from the ports of neutral countries adjacent to Germany. In a good many cases they found in the parcels mails large quantities of articles which if they had been carried as ordinary cargo merchandise would have been clearly condemnable as contraband. Among such articles were rubber, jewelry, chemicals, tea, cereals, coffee, meat, and other foodstuffs, soap, shoes, and even firearms. Many of them were mislabeled as "samples of no value," "reading matter" and not infrequently they were sent as first class mail on which the rates for letter postage were paid.[1] In a number of instances the parcels so seized were put into the custody of the Prize Court and condemnation was demanded by the Crown. While ordinarily the term contraband is understood to embrace only goods or merchandise shipped as freight and which constitutes a part of the cargo, there is no principle of logic or reason why it should be so restricted. So far as the effect upon the belligerent is concerned it is immaterial whether contraband is carried as freight or mail. The definition of contraband given by the British government in its memorandum prepared for the International Naval Conference, namely, "neutral property on board ship on the high seas or in the territorial waters of either belligerent which is by nature capable of being able to assist in and is on its way to assist in the naval or military operations of the enemy," would undoubtedly include property carried in the mails, if so destined and capable of serving the enemy.[2]

[1] See details in my *International Law and the World War*, Vol. II, pp. 351 ff.

[2] Bentwich, *The Declaration of London*, p. 59.

Sec. 390. The Same. Decisions of Prize Courts. The first case involving the question was that of the *Simla,*[1] which came before Sir Samuel Evans in May, 1915. The goods seized consisted of thirty-one packages of elephant tusks, leopard and snake skins, curios, etc., shipped on a German vessel in the parcels mail by certain colonists in German East Africa, addressed to various persons resident in Germany. No claimant appeared and the goods were condemned on the argument of The Procurator-General that Article 1 of the Eleventh Hague Convention which provides that "postal correspondence, whether of neutrals or of belligerents, and whether it is official or private, found at sea in a ship, whether neutral or enemy, is inviolable" did not apply to goods shipped by parcels post. In the case of the *Tubantia, Gelria,* and *Hollandia,*[2] decided a year later, Sir Samuel condemned a quantity of rubber sent by letter mail from South American ports on three Dutch vessels, addressed to consignees in Germany. Adverting to the attempt which had been made on "a very large scale" to use the postal service to smuggle "furtively" into Germany contraband goods under the protection of Article 1 of the Eleventh Hague Convention, Sir Samuel declared that such shipments were certainly not protected by that Convention. He added that "the attempt to make use of the Article as a cloak for parcels of rubber sent by post is dishonest in the extreme; and it shows how little effect is given in time of war to those conventions which have been made in time of peace."[3] The French Prize Council adopted the same view in a case involving the liability to seizure as contraband of a quantity of revolvers shipped by parcels post on a Spanish vessel and addressed to various merchants in Switzerland.[4] Against such seizures various neutral governments protested and the Swedish

[1] I Br. & Col. Pr. Cas. 287. [2] V Lloyd 282.

[3] In the case of the *Noordam and Other Vessels* (IX Lloyd 205; III Br. & Col. Pr. Cas. 488), Sir Samuel held that securities sent from Germany to Holland and which were to be re-forwarded to America and which were seized in the letter mails on Dutch steamships were "goods" within the meaning of the reprisals order and were not protected by the 11th Hague Convention. Some of the securities were enclosed in envelopes with letters and upon which the letter postal rate had been paid; others were made up into parcels. Sir Samuel said he did not think it made any difference how they were sent, whether by letter mail or parcels post. To the same effect see the *Frederick VII* (VI Lloyd 109; II Br. & Col. Pr. Cas. 395). Likewise goods sent from Germany to Copenhagen and dispatched from the latter port to the United States by parcels mail on a Dutch vessel were held to be goods of enemy origin in the sense of the reprisals order of March 11, 1915. *The United States* (VI Lloyd 170; II Br. & Col. Pr. Cas. 390).

[4] The *Barcelo* (Fauchille, *Jurispr. Franc.* 84. See also the case of the *Vénézuéla,* 27 *Rev. Gén.* (1920), *Jurispr.* 9.

government even resorted to measures of retaliation.[1] The American government, however, stated that it was "inclined" to regard articles shipped by parcels post as being "subject to the same treatment as articles sent by express or freight in respect to belligerent search, seizure, and condemnation"; what it actually protested against was the manner in which the right of search and detention in such cases was exercised.[2] The discussion of Article 1 of the Eleventh Hague Convention, the explanation of the German delegate (Herr Kriege), who proposed it, and the general understanding of those participating in the discussion leave little doubt that the protection intended by the article was limited to postal correspondence and did not include merchandise shipped either by letter mail or by parcels post.[3]

II

Hostile Destination

Sec. 391. What Constitutes Hostile Destination? In determining what constitutes hostile destination the Prize Courts were often called upon to weigh the element of intention which animated the parties, as against the actual facts. In such cases an intent to supply a belligerent with contraband goods might exist in the mind of the shipper or that of the consignee or both. On the other hand there might be no evidence of intent in the mind of either and yet the facts might show an undoubted enemy destination. Finally, both elements might coexist. And in case evidence of intent were shown, the intent might not have existed at the time of shipment although the shippers knew that the goods had an ulterior destination. In the case of the *Kim and other vessels*, Sir Samuel Evans after having reached the conclusion that the ultimate destination of the goods was the armed forces of the enemy, discussed the question as to whether the captor was bound to prove the existence of an original intention on the part of the shippers to send the goods to the enemy and whether the existence of such an intention was essential to condemnation. In holding that he was not so bound but that it was

[1] See my *International Law and the World War*, Vol. II, p. 353.
[2] See the correspondence between the American and British governments, *Spec. Supp.* to *10 Amer. Jour. of Int. Law*, pp. 404 ff.; also my work cited, Vol. II, pp. 353 ff.
[3] *Actes et Documents, la Deux. Conférence de la Paix*, Vol. I, p. 266, and Vol. III, pp. 173, 861, 1122, and the summary in my work cited, pp. 355-356.

sufficient to show that the shippers knew that the real destination of the goods was the armed forces of the enemy, he observed:

"It was argued that the Crown, as captors, ought to shew that there was an original intention by the shippers to supply the goods to the enemy government or the armed forces at the inception of the voyage as one complete commercial transaction.

"If the captors had to prove such an arrangement affirmatively and absolutely in order to justify capture and condemnation, the rights of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory. It is not a crime to dispatch contraband to belligerents. It can be quite legitimately sent subject to the risk of capture. But the argument proceeded as if it were essential for the captors to prove the intention as strictly as would be necessary for a criminal trial, and as if all the shippers need do was to be silent, to offer no explanation, and to adopt the attitude towards the Crown, 'prove our hostile intention if you can.'

"It is, no doubt, incumbent upon the captors in the first instance to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants.

"But it need not be an 'intention' proved strictly to have existed at the beginning of the voyage, or as an obligation under a definite commercial bargain. If at the time of the seizure the goods were in fact on their way to the enemy government or its forces as their real ultimate destination, by the action of the shippers, whenever their project was conceived, or however it was to be carried out—if, in truth, it is reasonably certain that the shippers must have known that was the real ultimate destination of the goods (apart, of course, from any genuine sale to be made at some intermediate place)—the belligerent had a right to stop the goods on their way, and to seize them as confiscable goods."

Sec. 392. Whose Intention Is Decisive as to Hostile Destination? View of British Prize Courts. Where the element of intention exists, whose intention is controlling, that of the shipper, the nominal consignee or any other person who may be in a position to control the final destination of the goods? In the case of the *Louisiana and Other Vessels*,[1] the Judicial Committee held that hostile destination might be determined not only by the intention of the shipper but by that of any other person who was in a position to control the ultimate destination of the goods, that in fact the intention of the latter person alone was controlling. Lord Parker, speaking for the Judicial Committee, said on this point:

"In considering, on the principle of continuous voyage, what is the ultimate destination of goods which are in their nature conditional contraband, it is the intention of the person who is in a position to control

[1] V Lloyd 248; III Br. & Col. Pr. Cas. 60.

such destination which is really material. Had Klingener and Fritsch [endorsers of the bills of lading] had any real interest, it might have been their intention which mattered. Had Christensen and Schrei [selling agents for the appellants] purchased the goods, or even had they obtained possession of the bills of lading under circumstances which entitled them to dispose of the goods, notwithstanding orders to the contrary from the appellants, or some one for whom the appellants were acting, the intention of Christensen and Schrei would have been a material point. Had the appellants been dealing with their own goods on their own behalf, their intention might have been the determining factor. But if, as their Lordships find, the appellants were acting by the direction of an agent of the German government it is the intention of the German government which must be looked for. It would be ridiculous to suppose that the German government were speculating in fodder stuffs for the Scandinavian markets. These stuffs were urgently needed in Germany[1] for the purposes of the war, and the only possible inference is that the goods in question were intended to reach Germany and be utilized for war purposes."

In the case of the *Norne and Other Vessels*,[2] the British Prize Court condemned a cargo of oranges shipped from Spain to Rotterdam and consigned to a neutral purchaser but who in the opinion of the Prize Court was never intended to have any control over them, that control being in the hands of a local agent of an enemy firm in Hamburg. The Judicial Committee in affirming the judgment declared that it was not sufficient for the appellants to establish that the Spanish shipper had no intention of sending his goods to Germany. Whether goods in any particular case are contraband by the application of the doctrine of continuous voyage was a question of fact.

As to this, Lord Parmoor said:

"Under the terms of the Order in Council the appellants must discharge the burden of proving that the destination, if the voyage had not been interrupted, would have been innocent. When an exporter ships goods under such conditions that he does not retain control of their disposal after arrival at the port of delivery, and the control, but for their interception and seizure, would have passed into the hands of some other persons, who had the intention either to sell them to an enemy government or to send them to an enemy base of supply, then the

[1] In the case of the *Twee Ambt* (X Lloyd 174), Sir Henry Duke, referring to this passage from the judgment of the Judicial Committee, in the *Louisiana*, said he was bound by it but that he must interpret its meaning. There were, he said, "a variety of cases in which owners of ships and cargoes may become liable, beyond their own intention, for the conduct of their agent, the master. The most extreme case within my recollection is that in which the owners of a vessel were held liable in the condemnation of their vessel by reason that the master against his will had been compelled to engage in an unneutral undertaking of carrying enemy forces and papers."

[2] IX Lloyd 402; III Br. & Col. Pr. Cas. 977.

doctrine of continuous voyage becomes applicable, and the goods on capture are liable to condemnation as contraband."

In short, it is the intention of the person who has the real control of the ultimate destination of the goods and not that of the shipper or the nominal consignee, which determines whether the destination is hostile or innocent.

Sec. 393. The Same. View of the German Prize Court. The German Supreme Prize Court had occasion to consider the element of intention in several cases. In the case of the *Maria,*[1] it condemned a cargo of wheat (conditional contraband) destined to Belfast and Dublin. The claimants contended that the wheat was intended to be sold to mills operating for private purposes and not for the use of the British government or its armed forces. The Prize Court held, however, that such intention, even if established, was insufficient, since "it could not be positively established to what use the wheat would actually have been put upon arrival in Belfast and whether the English government would not gladly have purchased it, and at a high price, especially since the bill of lading was made out "to order." Thus it was not the intention of the shipper which determined the destination but the possible ultimate use to which the goods might be put. Sir Samuel Evans in the case of the *Kim* referred to this decision as a "shocking example of the ease with which a Prize Court in Germany hacks its way through *bona fide* commercial transactions when dealing with foodstuffs carried by neutral vessels." Except for the fact, however, that the wheat was shipped before the war and had been sold to British merchants, the decision hardly seems less harsh than that of the British Prize Court in a number of cases, for example, that in the case of the *Norne and Other Vessels* cited above.[2]

In the case of the *Norden,*[3] the German Prize Court condemned a cargo of conditional contraband destined from Rotterdam to Norwegian ports. The claimants alleged that it was their intention to use the goods for the manufacture of other articles and not to export the products thereof from Norway during the war. Regarding the element of intention the Court declared that the intention of the claimants was not decisive. The notion of hostile destination in the sense of the prize ordi-

[1] I *Entsch.* 45; Fauchille et De Visscher, *Jurispr. All.* 34; Eng. trans. *X Amer. Jour.* 927.

[2] See the criticism of the decision in the case of the *Maria,* by Verzijl, who thinks Sir Samuel Evans' characterization of it was justified. *Grotius Ann. Int.,* 1917, p. 105.

[3] II *Entsch.* 35.

nance was purely objective in nature and not a subjective matter of intention, that is, it was a question of fact and not dependent upon the will of the parties.

Sec. 394. The Date at Which Hostile Destination Must Exist. To justify condemnation, at what moment must the enemy destination exist: the date of the loading of the goods on board, the date of the commencement of the voyage or the date of capture? The rule generally followed by the Prize Courts was that the hostile destination must exist at the time of the seizure of the goods, although account was taken of facts occurring subsequent to the date of seizure. Thus in the case of the *Maria* (*supra*), the German Prize Court, adverting to Articles 32 and 33 of the prize ordinance which establish the liability of conditional contraband to seizure and which lay down certain presumptions of hostile destination, added that "it must not be taken from this, however, that the presumption applies only to the *time of seizure,* and that the proof in rebuttal is to be considered as sufficient when it is shown that at the time of seizure the goods did not have an enemy destination. It is impossible to admit that the Court is bound to leave subsequent happenings out of consideration, as, for instance, a sale of the cargo to the enemy forces after capture and in ignorance of the same; or to consider the consignment of the cargo to a notorious army contractor as innocent merely because it was proved that at the time of seizure he had not yet resold the same to the government." In the case of the *Medea*,[1] where the German Prize Court pronounced a cargo of oranges destined from a Spanish port to a British port to be contraband, the claimants contended that at the moment of seizure no disposition had been taken relative to the use to which they were to be put and that it was the intention of the shippers to sell them in the public market sooner or later after arrival, according to the local usage. The Prize Court, however, referring to the cases of the *Maria* (*supra*) and the *Modig*,[2] said it had already been decided and fully demonstrated that in determining whether goods were contraband, account could not be taken exclusively of the situation at the moment of seizure. There was a legal presumption of hostile destination when in virtue of the transfer of the bills of lading the shippers were in reality deprived of all power of decision in respect to the use of the goods which became subject to the

[1] *Entsch.* 131; Fauchille et De Visscher, *Jurispr. All.* 111.
[2] I *Entsch.* 41.

requisition and control of the enemy government. Even if the fact of hostile destination did not exist at the time of seizure there was a possibility of ultimate hostile use by the enemy government and this possibility was decisive.

Sec. 395. The Same (Continued). View of the French Prize Council. The French Prize Council adopted a less rigorous view. In the case of the *Oranje Nassau,*[1] it refused to treat as contraband a quantity of coffee and honey shipped before the war on a neutral vessel and consigned to a merchant in Hamburg, on the ground, *inter alia,* that the mere possibility of an intention on the part of the receiver of the goods to sell them to an enemy government did not constitute proof that at the moment of seizure the goods were destined to such government. Likewise in the case of the *Grao,*[2] the Council refused to condemn certain goods laden on a neutral vessel and consigned to the city of Zurich, on the ground that nothing in the *dossier* justified it in considering the goods as having had, at the time of seizure, a destination other than that indicated by the bills of lading. But in the case of the *Kirkoswald,*[3] the Council condemned a quantity of mineral oil consigned to the Swiss *Société de Surveillance Economique,* because it was not denied that the destination of the oil was the Swiss branch of a German house, which branch was located only 500 meters from the German frontier and was engaged in clandestine trade with Germany. The Council added that it mattered little that the Swiss *Société* had, subsequent to the seizure, proposed to substitute in the place of the branch house other consignees who were acceptable to the French authorities. This fact could not influence the decision of the Council, since the legality of the capture must be determined by the fact of destination at the moment of the seizure.

Sec. 396. Proof of Hostile Destination. Burden of Proof. In theory the burden of proof rests upon the captor to establish the fact of hostile destination in the case of contraband but in practice this principle was not strictly adhered to.[4]

It often happened in practice that instead of requiring the captor to prove the fact of hostile destination the Prize Court relied upon inferences drawn from the surrounding circumstances or upon the presumptions of hostile destination laid down by the Declaration of London or by national prize regulations which placed, or were interpreted as placing, the burden of contrary

[1] Fauchille, *Jurispr. Franc.* 77. [2] Fauchille, *Jurispr. Franc.* 77.
[3] *Ibid.*, 441.
[4] As to the burden of proof see also Secs. 84, 331-335, *supra.*

proof upon the claimant. Not infrequently also the conclusions reached were based on presumptions invented by the Prize Courts themselves.[1] Sir Samuel Evans, in the case of the *Kim,* discussed the matter at some length. Regarding the degree of proof necessary to establish hostile destination he quoted Lord Stowell in the *Jonge Margaretha* (1 C. Rob. at p. 194) as authority for the view that "certainty" was seldom possible in such cases and that "highly probable destination" was sufficient, in the absence of proof to the contrary furnished by the shippers. It was, he said, no doubt incumbent upon the captors, in the first instance to prove facts from which a *reasonable inference* of hostile destination can be drawn, subject to rebuttal by the claimants. But it was not necessary for them to prove "affirmatively and absolutely" an original intention on the part of the shippers to supply the goods to the enemy government or its armed forces, since if that were necessary it would be impossible for a belligerent to prevent the transportation of contraband to the enemy. And he added: "So far as it is necessary to establish intention on the part of the shippers, it appears to me to be beyond question that it can be shown by inferences from surrounding circumstances relating to the shipment of and dealings with the goods. Cargoes are inanimate things, and they must be sent

[1] Sir Erle Richards in an article entitled "British Prize Courts and the War" (*Brit. Yr. Bk. of Int. Law,* 1920-21, pp. 25 ff.), after having detailed the methods by which the British authorities obtained extrinsic evidence for the purpose of establishing hostile destination (see Sec. 86, *supra*), stated that in cases where this mode of proof was not possible "other evidence was admitted to shift the onus on to the claimants of showing that the ultimate destination of the goods was neutral." Thus in a case (the *Hillerčd*) where the consignee was a Swedish lawyer with a small salary and no experience in trade he became the purchaser of a cargo of oil at a price of 40,000 crowns and the charterer of a ship for which he paid cash in advance to the amount of 16,500, the Court put upon him the onus of proving that his residence was a genuine one and that he was a *bona fide* trader. On the other hand, where the consignee had been engaged in trade in the neutral country before the war and had never been the agent of a German house, the onus of proving that he was a "dummy" consignee or agent for the German government, was shifted to the captor. But if it was shown that there had been a marked increase of his imports of commodities on the contraband list, inferences of an intention to re-export them to Germany were drawn against him and the onus of proving the contrary was shifted back to his shoulders. Likewise where the trade statistics of a neutral country showed an enormous increase of imports of particular commodities over the pre-war scale the onus was placed upon the consignee of such article to show an absence of intention to re-export them to enemy country.

See a criticism of the new British policy of inventing "presumptions against shippers drawn from mere possibilities" and of shifting the burden of proof from the captor to neutral shipper, by Mr. C. P. Anderson in an article on the "Chicago Packing House Cases," XI, *Amer. Jour.,* pp. 259 and 264. See also the observations of Verzijl (*Grotius Ann. Int.,* 1917, p. 81), who criticizes the "abuse" by the Prize Courts of their power in respect to the onus of proof for the purpose of condemning innocent cargoes consigned to neutral ports.

on their way by persons. If that is all that was meant by counsel for the claimants when they argued that 'intention' must be proved, their contention may be conceded."

The French Prize Council admitted that, in principle, it was incumbent upon the captor in the case of conditional contraband to establish the fact of destination to the government or armed forces but that when the consignments were "to order" the captor had no means of doing so and could not be required to do it and that in such cases it rested with the Prize Council to endeavor to discover from the attendant circumstances the real destination.[1]

Sec. 397. The Same (Continued). Admission of Extrinsic Evidence. The old rule of procedure that captors must prove their case from the ship's papers and from the "standing interrogatories" addressed to the crew—that a ship must be condemned "out of her own mouth," as Sir J. Marriott put it—was not followed by the Prize Courts during the late war, particularly in cases involving the doctrine of continuous voyage. In fact the old practice was modified by the British Prize Court Rules of 1914, which permit with the consent of the Court the introduction of any extrinsic evidence, oral or documentary, which is material to the issue.[2] The old practice was not unreasonable in the eighteenth century when it was introduced, when the destination of the goods was usually that of the ship and when the papers indicated fairly enough the real destination of both. But when as a result of the development of the means of land communication this ceased to be true in respect to the destination of the goods and the doctrine of continuous voyage came to be applied to the carriage of contraband, it became necessary to rely on other evidence than that coming from the ship, otherwise it would often have been impossible for captors to establish the fact of ultimate enemy destination of goods in the case of ships destined to neutral ports. In such cases the ship's papers never reveal the ultimate destination of the goods, nor in most cases would the testimony derived from the standing interrogatories do so. In many cases involving ultimate destination which came before the Prize Courts during the late war the goods were consigned to enemy agents in neutral ports, who were mere "dummy consignees," or "conduit pipes," through

[1] See, among numerous cases, the *Nieuw Amsterdam*, Fauchille, *Jurispr. Franc.* 14, and the *Banda*, *ibid.*, 90.
[2] See further as to this, Secs. 85-86, *supra.*

which consignments reached the enemy, and the real character of whom and the nature of whose transactions were of course not revealed by the ship's papers. On the other hand, cablegrams, wireless telegraphic messages and letters were frequently intercepted or fell into the hands of the authorities of the captor state which threw light on the transactions and sometimes furnished conclusive evidence of the real destination. The activity of the British government in exploiting these sources of information is thus described by an English lawyer who was frequently counsel in cases involving such transactions:

"These communications were collected, sorted and arranged with infinite care and industry by a special department of the government appointed for that purpose, so that in the later years of the war, at any rate, there was in existence a *dossier* more or less complete of all the principal merchants concerned in trade with Germany. Their code words were discovered, their dealings were tabulated, and it became possible in this way either to show the enemy destination of the particular consignment seized or to infer from the transactions of the consignees during the war, even if the evidence in any particular case were not directly to the point, that captured cargoes consigned as a result of these communications were going to the enemy; an inference which consignees must displace to avoid condemnation."[1]

In the case of the *Andjik,* the British Prize Court said apropos of the activity of the government in this connection: "Some facts were derived from the expert knowledge of servants of the Crown who were engaged in the supervision of foreign trade; and (other) facts were derived from the knowledge of other servants of the Crown who were engaged in the supervision of foreign correspondence who, as I have already said in other cases, seem to have exercised an unceasing vigilance over communications by sea, by cable, by mail and by wireless, and to have derived from them a very great deal of information."

Sec. 398. The Same. Neutral Protests. Neutrals of course did not fail to protest against this new rule of prize procedure. The American government in particular, referring to the change of procedure, declared that "innocent vessels or cargoes are now seized and detained on mere suspicion while efforts are made to obtain evidence from extraneous sources to justify the detention and the commencement of prize proceedings. The effect

[1] Sir Erle Richards, "British Prize Courts and the War," *Br. Yr. Bk. of Int. Law,* 1920-21, p. 25. As to the necessity of admitting extrinsic evidence in such cases, in order to establish the fact of hostile destination see also Roscoe, "Prize Court Procedure," *ibid.,* 1921-22, pp. 90 ff.

of this new procedure is to subject traders to risk of loss, delay and expense so great and so burdensome as practically to destroy much of the export trade of the United States to neutral countries of Europe." [1]

Criticism of the new procedure by English writers also was not entirely lacking.[2] It would seem that if the doctrine of continuous voyage or ultimate destination is to be retained as a principle of international law the rule permitting the admission of extrinsic evidence, subject of course to the strict control of the Court will have to be recognized, otherwise the doctrine cannot be effectively applied. It seems to be the only procedure by which the real facts can be brought out. But even those who defend the new practice as necessary under modern conditions admit that it may necessitate delays in bringing cases to trial [3] and in some cases cause injustice to claimants.

Sec. 399. The Same. Justification by the Prize Courts. The necessity of admitting extrinsic evidence and even of requiring the production on the part of claimants of documents such as account and letter books and other usual commercial documents in cases involving the question of ultimate destination where goods are shipped on a neutral vessel and consigned to a neutral port was emphasized by Lord Parker, speaking for the Judicial Committee in the case of the *Consul Corfitson*.[4]

Lord Parker added that in the absence of this information the Crown would be without all means of proving that the goods in question were contraband of war.

In the case of the *Baron Stjernblad*,[5] where it was a question of whether goods shipped on a neutral vessel and consigned to a

[1] Note of the American Secretary of State to the United States Ambassador at London, Oct. 21, 1915, Spec. Supp. to X *Amer. Jour.*, p. 77. The British government in reply asserted that the old practice had become obsolete and that modern conditions had made the change necessary (*ibid.*, p. 125). The British government also contended that during the American Civil War the captor was allowed to establish enemy destination by "all the evidence at his disposal" and it cited the case of the *Bermuda* (3 Wall. 515) in support of its contention. The American Secretary of State in turn denied that this case supported the claim of the British government to take a vessel into port, there to obtain evidence to justify it in detaining the vessel for prize proceedings (*ibid.*, 77).

[2] For example, Baty, *Britain and Sea Law*, pp. 62 ff. See also his article, *Neglected Fundamentals of Prize Law*, in the *Yale Law Journal*, Vol. 30, p. 34. But while criticizing the new procedure as improper he admitted that "the conception of continuous voyage requires captor's evidence to make it effective." Compare also Briggs, *The Doctrine of Continuous Voyage*, pp. 152 ff.

[3] Roscoe, in the article cited (p. 95), so admits.

[4] VI Lloyd 268; III Br. & Col. Pr. Cas., p. 11. See the passage cited, Sec. 93, *supra*.

[5] VI, *ibid.*, 99; III, *ibid.*, 19.

port in a neutral country (Sweden) into which imports of the particular commodities had enormously increased since the outbreak of the war and from which country re-exports to Germany had correspondingly increased, had an ultimate enemy destination, Lord Parker, adverting to these circumstances as creating strong suspicion and pointing out that evidence derived solely from the ship's papers would be insufficient to establish the facts, said:

"It is clear that the ultimate, as opposed to the ostensible, destination of goods would seldom, if ever, appear on the ship's papers, or be within the knowledge of the master or crew. It would have to be proved or inferred from other sources; and it could hardly be contended that, if the Crown were in possession of evidence obtained from such other sources from which an ultimate destination in an enemy country could be inferred as reasonably probable, the seizure of the goods would not be justified."

The French Prize Council, like the British Prize Courts, did not hesitate to admit extrinsic evidence in the form of wireless telegraphic communications exchanged between correspondents and agents of enemy houses, and other similar evidence.[1]

Sec. 400. Proof Derived from the Ship's Papers. By Article 32 of the Declaration of London the papers on board are conclusive proof as to the destination of a ship carrying absolute contraband, unless she is found to be clearly out of the course indicated by her papers and is unable to give adequate reasons to justify such deviation. The General Report accompanying the Declaration explains that this statement of the rule is "not to be interpreted too literally, since that would render fraud easy. A search of the vessel might reveal facts which show beyond doubt that the real destination is other than that indicated by the papers. The evidence contained in the papers is therefore conclusive only when the evidence is in accord with the facts." [2] By Article 35 of the Declaration, the ship's papers are likewise conclusive, subject to the exception mentioned above, both as to the destination of the ship and the port of discharge of the goods, in the case of a vessel carrying conditional contraband. The

[1] See the cases of the *Almazora* (No. 3), the *Pena Castillo* (Nos. 1 and 2) and the *Luis*, 27 *Rev. Gén.* (1920), *Jurispr.* 72, 75, 77, 82. Among other cases in which wireless messages, telegrams, letters and other extrinsic evidence were relied upon in establishing hostile destination may be mentioned the *Kim* (*supra*), the *Hellig Olav* (VI Lloyd 163), the *Kronprins Gustaf Adolf* (*ibid.*, 246), the *Liv* (VII, *ibid.*, 99), the *Norne* (IX, *ibid.*, 429), the *Tiber* (Fauchille, *Jurispr. Franc.* 414) and the *Garibaldi* (Fauchille et Basdevant, *Jurispr. Ital.* 248).

[2] Compare Bentwich, *The Declaration of London*, p. 65.

interpretation of the General Report referred to above is equally applicable to this Article; that is, if the papers are fraudulent they may be disregarded. If the vessel carries no papers it may be difficult for the Prize Court to determine its destination but as ships are usually required to carry papers such cases are rare.[1] Naturally, the destruction of the papers before seizure ("spoliation" of papers, as it is termed) creates a presumption of guilt if it is not actually conclusive. Thus the French Prize Council in the case of the *Iro-Maru*[2] declared that according to a rule of international law of which article 3 of the French naval *règlement* of July 26, 1778, was an application, a ship, whatever its flag, whether neutral or allied, was good prize, whenever it was established that its papers had been thrown overboard or otherwise destroyed or disposed of, without there being any need to examine into the character of the papers or as to who destroyed them. The same rule applies in the case of goods carried by the ship.[3]

In a number of cases the Prize Courts were called upon to determine what effect should be given to evidence contained in the ship's papers as to destination when certain facts and circumstances gave rise to suspicion or even indicated a different destination. In the case of the *Twee Ambt*,[4] condemnation was sought of a Dutch vessel (and its cargo) which was captured while carrying a cargo of coffee from Java to Holland, on the ground that the master was said to have revealed at Freetown, Sierra Leone, when the ship called there, the design of taking the ship and cargo to a German port (Stettin). The ship's papers were regular and indicated Rotterdam as the port of destination. Sir Henry Duke ordered the release of the vessel and the cargo on the ground that she was at the time of capture still on her authorized voyage and that it could not be said that her destination was Stettin, because although the master had conceived the design of taking the ship and her cargo to an enemy

[1] Such a case was the *Katwijk Aan I and II* (II *Entsch.* 292), which came before the German Prize Court in 1919. The Court declined to condemn the cargo for want of evidence that it was destined to the enemy. In the case of the *Ellispontos* (Fauchille 319) the lack of a bill of lading was considered to be proof of hostile destination in the case of a consignment "to order" to a neutral port. To the same effect see the *Atlas* (*ibid.*, 39), the *Nicolaos Canellopoulos* (*ibid.*, 339), the *Panelinion* (*ibid.*, 407), the *Thesalia* (*ibid.*, 453), the *Eryssos* (*ibid.*, 472).

[2] Fauchille, *Jurispr. Franc.* 323.

[3] Sir Samuel Evans, in the case of the *Ophelia* (I Br. & Col. Pr. Cas. 222), discussed the point as to how "seriously the Prize Courts have regarded the destruction of documents," such as ships' papers and documents relating to cargoes. See Secs. 90, 179, *supra*.

[4] X Lloyd 165; III Br. & Col. Pr. Cas. 730.

port, his crew refused to support him, in consequence of which he was unable to carry out his design; and that therefore there was no overt act which would subject the ship and cargo to condemnation. Adverting to the fact that the owners of the ship and cargo were neutrals engaged in a commercial enterprise with the approval of the British government and that if their ship and goods were condemned it would have to be done because of acts which they did not authorize, Sir Henry said:

"It is quite true that in some prize cases you find passages in which it is said that although the act done is an act of barratry, nevertheless the ship and the cargo must pay the penalty. But in every case, so far as I am aware, the penalty was incurred only by the act done. The design of the master, however criminal it might have been, was never carried into practical effect. There is no overt act on the part of the ship which warrants my saying that this ship had been brought into the prosecution of an unneutral undertaking. She was on her authorised voyage, and she was subjected, in due course, to the control which the British authority had provided for her. In my opinion, there is no evidence which would warrant me in saying that at Freetown the master entertained the design at all costs of going to Stettin; I think it was in contemplation and was not a design definitely adopted; and I am satisfied, as a matter of fact, upon the proofs before me, that the master never could have carried the crew with him in any undertaking of that kind; and so, in point of fact, I say that whatever the criminal design or the criminal wishes of the master, and however unneutral the mind of the master, he never, in fact, began to carry them into execution, and he never could have carried them into execution."

In the case of the *Zoodochos-Pighi*[1] the French Prize Council condemned a cargo of coal laden on a neutral vessel (Greek) captured in the Chio canal at a less distance from the Turkish island of Koumouthi than from the canal occupied by the Greeks, and which was consequently in Turkish waters. The ground of condemnation was that at the time of capture the ship, whose apparent destination was Salonika, was outside the course indicated by its papers and was unable to give satisfactory reasons for its deviation, in accordance with Article 35 of the Declaration of London.[2]

In the case of the *Hugo Hamilton*[3] the German Prize Court refused to condemn the contraband cargo of a Swedish vessel

[1] Fauchille, *Jurispr. Franc.* 313.

[2] See also the similar case of the *Adelphotis* (*ibid.*, 383), where a Greek vessel (and its cargo) captured in the Chio canal were condemned because the vessel at the time of capture was about 100 miles out of its normal course and the master could give no satisfactory explanation of his deviation.

[3] II *Entsch.* 102.

bound from Chile to a Swedish port when the ship's health certificate (*gesundheitspass*) indicated an intermediate enemy port (Kirkwall) but the other papers of which indicated only a Swedish port. Article 32 of the Declaration of London and the corresponding Article 31 of the German prize ordinance, said the Court, made the evidence of the ship's papers conclusive as to destination. There was here no discordance between different papers on the ship. The bill of lading and the charter party indicated that the ultimate destination of the ship was a Swedish port. The health certificate furnished by the English vice-consul could not therefore be considered as a paper which indicated its destination. In the case of the *Helicon,*[1] the German Prize Court awarded an indemnity for damages sustained in consequence of the capture of a neutral ship, and for the seizure of its cargo consisting of conditional contraband when at the time of capture the ship was proceeding to a neutral port (in Chile) in accordance with her papers. The lower Prize Court had condemned both the ship and cargo on the ground that it was outside the course indicated by its papers and was taking the cargo (coal) to the English fleet. The supreme court reversed the judgment, basing its opinion on Article 35 of the Declaration of London and the corresponding Article 36 of the German prize ordinance which makes the ship's papers conclusive as to destination except in the case of unjustifiable deviation. There was nothing to show that the papers were incorrect, and no proof had been adduced to show that the ship had unjustifiably deviated from its route. The fact that it had changed its course as a result of injuries near Cape Horn gave no ground for legitimate suspicion. Moreover, the ship had been arrested at a place which agreed perfectly with the port of alleged destination.

"It only remains to inquire whether the indications mentioned in the papers concerning the port of discharge are contradictory one with another in any manner. Certainly the inexactness of the papers in the sense understood here, may result from the fact that during the voyage a new port of discharge had been assigned to the ship. It is not contestable that the interested parties have had the means of defeating the giving of notice of this kind to the ship during its sojourn at Adelaide. It may even be admitted that an indication purely eventual, such as the lower court has considered it, suffices to realize the situation contemplated by article 36 of the prize ordinance. In fact it has not been proven that such an indication had been given. The arguments advanced on this subject before the lower court are simple pre-

[1] I *Entsch.* 411; Fauchille et De Visscher, *Jurispr. Franc.* 164.

sumptions which, in an impartial appreciation do not find sufficient confirmation in the facts."[1]

Sec. 401. Presumptions of Hostile Destination. Rules of Declaration of London. The Declaration of London (Art. 34) lays down the presumption that conditional contraband has an enemy destination when it is consigned to enemy authorities, or to a contractor in enemy country who is a notorious purchaser of supplies for the enemy government, or when it is consigned to a fortified place belonging to the enemy or a place serving as a base of supplies for the enemy. These presumptions are, however, rebuttable. But the effect is to shift the onus to the shoulders of the neutral claimant of proving that the goods are not in fact intended for the armed forces of the enemy but for the use of the civil population.[2] The distinction which these rules attempt to draw between consignments intended for the use of the armed forces and the civil population are more or less arbitrary and illogical. Thus goods consigned to an ordinary merchant in the enemy country are not presumed to have a hostile destination yet if consigned to a government contractor or purveyor of supplies there is such a presumption. But any merchant who deals in such supplies, whether he is a contractor or purveyor or not will sell them to the government or the government may requisition them and use them to supply the armed forces. Again a belligerent is free to consider any enemy port a "fortified" place, and, in any case, the existence of fortifications usually bears no relation to the eventual use of supplies for the armed forces. Finally, in this age of highly developed railway communications, any port may not improperly be regarded as a "base" for supplying the enemy armed forces. During the late war also the distinction between that part of the population which was engaged directly or indirectly in the prosecution of the war and that part which was engaged strictly in civil pursuits largely disappeared and the attempt to distinguish between supplies intended for the one and the other became futile and illusory.

Sec. 402. Establishment of New Presumptions by Belligerent Governments. In consequence of the situation referred

[1] See also the case of the *Gamma* (II *Entsch.* 185), where the German Prize Court likewise refused to condemn a neutral ship (and its contraband cargo) bound from New York to Rotterdam, and which had clearly deviated from its route in order to avoid the danger of mines in the English Channel.

[2] As to the nature and effect of these presumptions compare Bentwich, *The Declaration of London*, pp. 70 ff.

to in the preceding section, various belligerent governments disregarded the rules of the Declaration or established new presumptions of hostile destination in addition to those laid down by the Declaration. Thus the British government by an Order in Council of October 29, 1914, proclaimed that notwithstanding the provisions of article 35, vessels bound for neutral ports, if the goods were consigned "to order," or if the ship's papers did not show who was the consignee or if they showed a consignee in territory belonging to or occupied by the enemy, should be liable to capture, and that in such cases the burden of proving an innocent destination should be on the owner of the goods. Most of the other belligerents established similar presumptions. A like presumption was laid down in the case of goods consigned to persons who during the war had exported contraband to the enemy; when the goods were destined to a neutral country whose importations of such commodities were disproportionately in excess of its pre-war importations; when the ship's papers in the case of goods consigned to a neutral country adjacent to enemy territory did not establish that the final destination was a neutral country, etc.[1] As has been said, the Prize Courts introduced other presumptions still, especially by shifting the burden of proof from the captors to the claimants. Sir Samuel Evans, in the case of the *Kim*, referring to the character of the new rules laid down by the British Orders in Council, said that so far as they related to presumptions and onus of proof, as for instance, when goods are consigned "to order" without naming a consignee, they were "matters really affecting rules of evidence and methods of proof in this court" and could not therefore be challenged as violations of any rule of international law.

In the case of the *Alfred Hage*, decided by the German Prize Court,[2] the claimants argued that the presumptions (which were largely the same as those of Article 34 of the Declaration of London) were merely instructions addressed to the commanders of ships making captures and were not intended to be rules binding upon the Prize Court. The Court rejected this argument:

"The prize ordinance," it said, "is not addressed solely to the commander of the capturing ship. It conforms in general to the Declaration of London, which fact warrants the conclusion that it has conceived the presumptions enumerated in article 33 (of the prize ordinance) in the same sense as article 34 of the Declaration of London has. It is not

[1] As to these new presumptions compare Verzijl, *op. cit.*, pp. 760 ff., and Briggs, *op. cit.*, 158 ff.

[2] I *Entsch.* 25; Fauchille et De Visscher, *Jurispr. All.* 19.

sustainable that this article 34 is solely an instruction for the officers of the ships of war and, if there were the least doubt as to this, it would be removed by the commentaries which were made upon it and which are found in the General Report accompanying the Declaration. It is there said, in effect, that the presumptions must facilitate the administration of the proof which is incumbent upon the captor, and the commentary adds expressly in that which concerns the rebuttal of the presumptions that the tribunals, that is to say in the first place, the national court, and in the second place, the International Court of Prize, the establishment of which was then projected, would have jurisdiction."[1]

Sec. 403. Interpretation and Application of Presumptions. Goods Consigned to Enemy Ports. It is not practicable here and it would serve no useful purpose to examine the numerous decisions of the Prize Courts in all the cases involving the applications of the various presumptions of hostile destination established by the Declaration of London or by various government orders, decrees, amendments to the prize regulations, etc. It must suffice therefore to call attention only to the more important interpretations.

The Prize Courts were called upon in a number of cases to apply the rule laid down by Article 31 of the Declaration of London, namely that proof of hostile destination is complete and irrebuttable in the case of absolute contraband when the goods are documented for discharge in an enemy port. Condemnations of goods in such cases were made by the Prize Courts of Austria-Hungary, Germany, Great Britain, and France,[2] and the rule was extended by the German Prize Court to apply to the transportation of absolute contraband through an enemy port to the port of a neutral country having no seaboard (for example a cargo destined for Switzerland and laden on a Dutch ship bound for Marseilles, where it was to be disembarked).[3]

In the case of the *Axel Johnson;* the *Drottning Sophia,*[4] the British Prize Court applied rigorously the legal presumption and refused to take into consideration the fact that goods destined to an enemy country for the purpose of being worked over were to have been ultimately returned to the neutral country after such treatment. The cargo in this case consisted of wool (absolute contraband) shipped on neutral vessels (Swedish) from a neutral port to Germany where the wool was to be combed, after which it was to be returned to Sweden in pursuance of an

[1] To the same effect see, among other cases, the *Modig* (I, *ibid.*, 41) and the *Maria* (I, *ibid.*, 45).
[2] Verzijl (*op. cit.*, pp. 784-787) gives a full citation of such cases.
[3] The *Kediri* (II *Entsch.* 275).
[4] VI Lloyd 379; III Br. & Col. Pr. Cas. 871.

agreement between the German and Swedish governments. The by-products were to be left in Germany. The Prize Court condemned the goods and the judgment was affirmed by the Judicial Committee. After remarking that the combing of the wool was "a process of some elaboration and some time," and that it was not therefore a question of mere transit through the enemy country, Lord Sumner said:

"Their Lordships do not feel called upon to decide one way or the other whether there are any circumstances in which the temporary character of the stay of the supposed contraband goods in the enemy country would prevent the goods from being contraband, and would therefore deprive a belligerent of the right to seize them, but they are clearly of opinion—and no authority whatever was cited to the contrary—that, where wool is to be sent into the enemy's territory for treatment like this, during a considerable stay, and with no small amount of alteration of identity, it is impossible to say that the temporary character of the proceeding, such as it is, distinguishes the case from that of goods permanently sent into enemy territory with the intention that they should there remain or be consumed.

"With regard to the other question, whether such an international agreement as is suggested—would of itself prevent goods, which were otherwise condemnable as contraband, from being condemned, upon the ground that faith must be given to the solemn promise of the other belligerent, and therefore that the goods are not going to augment his stock—it is unnecessary to express any opinion, because the facts do not raise it. On a close examination of the affidavit of the one deponent who speaks to this matter, it is clear, that, although the Swedish government at the time in question required that the Swedish exporter should as a condition of obtaining a licence to export, give his promise to bring the wool back, there was no proof of a promise on the part of the German government, either to the government of Sweden or to the individual Spanish exporters, to ensure this return."

Sec. 404. The Same (Continued). Ship Touching at Intermediate Enemy Port. The second rule of the Declaration (Art. 31) relative to absolute contraband is that proof of hostile destination exists when the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods are documented. The German Prize Court in the case of the *Alexandra*[1] interpreted strictly the rule, and held that goods, absolute contraband laden on a neutral ship (Danish) bound from a Danish port to Boston must be considered as having a hostile destination by reason of the fact that the ship

[1] I *Entsch.* 430; Fauchille et De Visscher, *Jurispr. All.* 326.

touched at an enemy port (Newcastle) merely for the purpose of coaling. The Court said:

"It must be admitted, in effect, that the enemy destination of the goods is proven, since before reaching Boston the ship had to touch at the port of Newcastle. It matters little that it was to touch there—this may be admitted as proven—only for the purpose of coaling. This interpretation follows even from the text of the disposition (Art. 30, par. 1b of the German prize ordinance), and it is confirmed by Article 30 of the Declaration of London and by the commentary thereon contained in the General Report. If the ship touches at an enemy port, says the commentary, there will be a strong temptation for the master to disembark the contraband which he could probably sell at a high price and there would be an equal temptation for the local authorities to requisition it. It may be remarked at the same time that the claimants are not allowed to prove that there was a really neutral destination and that this was the intention of the owners."

That is to say, the fact of touching at an enemy port for any purpose whatever is conclusive of hostile destination in the case of absolute contraband goods and the interested parties are not permitted to prove the contrary.

But in the case of the *Brage* (No. 2),[1] the Supreme Prize Court of Germany overruled the judgment of the lower court which had held that absolute contraband laden on a neutral ship destined from a Norwegian to a Danish port, for trans-shipment at the latter port, for transportation to the United States, must be regarded as having a hostile destination by reason of the fact that the ship making the final voyage would be obliged to touch at an English port. The lower court took the position that in a case like this where several ships had a part in the transportation it was immaterial which ship called at the enemy port and that it was sufficient to establish hostile destination if the ship transporting the goods on their final voyage touched or would touch at the enemy port even though it was not the vessel on which the goods were captured. The supreme court declined to adopt this view; it was, said the Court, in clear contravention of the law and its acceptance would lead to untenable consequences. In short, the rule applied only to the ship upon which the goods are captured and not to a later ship which was to carry them to their final destination.

The rule discussed above refers to absolute contraband. In the case of conditional contraband the touching of the ship at an enemy port before reaching its final neutral destination does not

[1] I *Entsch.* 227.

create in itself a presumption of hostile destination of the goods; nevertheless, the fact of so touching estops the claimant from proving the contrary when hostile destination is presumed from other circumstances of fact.

Sec. 405. Goods Destined for the Enemy Government or Armed Forces. The second presumption laid down by Article 31 of the Declaration of London in the case of absolute contraband is that proof of hostile destination is complete when it is shown that the goods are for delivery to the armed forces of the enemy. In the case of the *Kiew No. 3*,[1] the German Supreme Prize Court held that absolute contraband goods laden on a neutral ship (Danish) bound from Copenhagen to Liverpool and which on a previous voyage from Denmark and Germany had been captured by the English and released on condition that the owners would return the goods to England and put them at the disposition of the Prize Court, must be considered as destined to the enemy authorities. The Court, relying upon the terms of the prize ordinance, said:

"The condition required to create a legal presumption of destination to the enemy authorities is none the less satisfied when the goods are, as in the present case, deliverable to an enemy Prize Court. The position that this institution [the Prize Court] occupies from the point of view of public internal law does not prevent its being considered as an enemy 'authority.' To be sure, it has nothing to do with the equipment and revictualment of the English troops, but this matters little. With good reason counsel for the claimants have demonstrated that it is necessary to distinguish between the local destination of the cargo . . . and the destination of its ultimate use. The first destination exists here in so far as it is a question of putting the goods at the disposition of the English Prize Court; and it is established by article 33, paragraph 1a of the prize ordinance by which there is a presumption of hostile distinction when the goods are destined for the use of the enemy government or its armed forces and it is upon the claimants to rebut this presumption by proof to the contrary. There is place for holding, relative to the significance and the weight of the legal presumption, to the view which has been constantly adopted by this Court. It is not exact to say that it imposes on claimants excessive requirements which would render it impossible to rebut the presumption. Numerous decisions of this Court show the contrary. But it is true that in a case like this the contrary proof cannot be made. In effect, by putting the goods at the disposition of an enemy Prize Court, the owners have put them within the power of the enemy administrative authorities whose duty it is to equip and feed the troops, and who even if the Prize Court were to order the release of the goods might, in case of need, requisition them for the use of the armed forces."

[1] I *Entsch.* 241; Fauchille et De Visscher, *Jurispr. All.* 184.

In a number of cases cargoes consisting of railway material destined to the enemy administrative authorities of state railways were held to be destined to the armed forces of the enemy.[1] In the case of the *Craigisla*,[2] the South African Prize Court held that a quantity of coal laden on a neutral ship consigned to a railway company engaged in constructing and managing railways in German South-West Africa for the German government was contraband of war destined for the use of an enemy government.

The third presumption laid down by the Declaration of London (Art. 34) is that conditional contraband goods consigned to a contractor (*commerçant*) established in the enemy country and who as a matter of common knowledge supplies such articles to the enemy, are to be considered as having a hostile destination. Only a few cases involving directly the application of this rule came before the Prize Courts and they were of no particular importance.[3]

Sec. 406. Consignments to Agents of Enemy in Neutral Territory. The fourth presumption established by the Declaration of London is that conditional contraband destined to an agent of the enemy state has a hostile destination. In the case of the *Tysla*,[4] Sir Samuel Evans condemned a cargo of conditional contraband laden on a neutral ship and consigned to a firm in Norway which denied that it was the real consignee and which made no claim, the real consignees being agents of the German government.[5]

In the case of the *Peloponesos*,[6] the French Prize Council condemned a quantity of Turkish gold (absolute contraband) consigned by a bank in Greece to a company whose president was an agent of an enemy state, this on the authority of Article

[1] See the French and Austro-Hungarian cases cited by Verzijl, *op. cit.*, p. 789.

[2] Cases Decided in the Prize Courts of South Africa, p. 73.

[3] In the case of the *Craigsla* (*supra*) one of the grounds of condemnation mentioned by the Prize Court was that the goods were destined to merchants in German South-West Africa who were known to be "common suppliers of the enemy government." See also the case of the *Aros Castle* decided by the South African Prize Court at Cape Town (*ibid.*, p. 115), where a cargo of conditional contraband consigned to one Ribeiro at Beira in Portuguese East Africa was condemned on the ground that the consignee was a mere "cloak name" for a German who was engaged in supplying goods to the German forces in German East Africa, in pursuance of a thoroughly organized system for the importation and sale of supplies to the German authorities. See also the similar case of the *Cargo ex Beira* (*ibid.*, p. 125), where a quantity of contraband goods consigned to one Sambado at Beira was condemned for the same reason. See also the German case of the *Nordsöen* (I *Entsch.* 177).

[4] V Lloyd 433. [5] See Sec. 408, *infra*. [6] Fauchille, *Jurispr. Franc.* 311.

1 of the decree of April 12, 1916, which established a presumption of hostile destination in the case of absolute contraband consigned to or for the agent of the enemy state in neutral territory.[1]

Sec. 407. Fraudulent Concealment. It is an established rule of prize law that false labeling or misdescription of goods or fraudulent concealment creates a presumption of hostile destination. Thus in the case of the *Lygenfjord*,[2] Sir Samuel Evans held that part of a cargo shipped on a neutral vessel consigned to a neutral port and consisting of 250 sacks the contents of which were described in the bill of lading as coffee but which turned out to consist in part of rubber mixed with the coffee, must be considered, on the basis of inferences drawn from this fact, as having had a hostile destination. In the case of the *Kim*, where a quantity of rubber had been misdescribed as "gum," Sir Samuel, discussing the presumption created by such acts, said:

> "Any concealment or misdescription, or device calculated and intended by neutrals to deceive and to hamper belligerents in their undoubted right of search for contraband, will, while I sit in this Court, weigh heavily against those adopting such courses when any presumptions or inferences have to be considered. Neutrals are expected to conduct their neutral trade during the war not only without having recourse to fraud or false papers, but with candor and straightforwardness. As has been said by the American Supreme Court, 'Belligerents are entitled to require of neutrals a frank and *bona fide* conduct.' It will not be found against their interest to pursue such conduct.
>
> "But in investigating attempts to mislead by misdescription or otherwise care must be taken to ascertain who have taken part in such attempts and to what extent."

In this case Sir Samuel having found that the misdescription of the rubber was due not to the claimants but to the charterers of the vessel, declined to infer therefrom an intention of hostile destination.

Sec. 408. Consignments to Other Than *Bona Fide* Consignees. The Prize Courts, particularly of Great Britain, were

[1] See also the case of the *Narrovian* (*ibid.*, 68), where the council of State overruling the Prize Council condemned a quantity of wheat consigned to a purchaser in a neutral port (Genoa) who was merely a *personne interposée*, the real consignee being an agent of the German government established at Genoa, and engaged in purchasing supplies for his government. See also the case of the *Rioja* (*ibid.*, 141), where the Prize Council, while releasing goods consigned to a merchant in Zurich, refused to award damages for the seizure, because it was shown that he was in "constant commercial relations with Germany" and therefore the seizure was sufficiently justified.

[2] VI Lloyd 115.

frequently called on to deal with goods which had been consigned to persons in neutral ports who served merely as agents, intermediaries or "conduit pipes" through which the goods were forwarded to Germany for the use of the government or its armed forces.[1] Such persons were treated by the Prize Courts as sham or "dummy" consignees and the goods addressed to them were condemned when the claimants were unable to prove that they were *bona fide* purchasers and that the goods were to be consumed in the neutral country. Thus in the case of the *Rijn* and the *Prins der Nederlanden*,[2] where goods, conditional contraband, shipped on a German vessel with a German destination prior to the outbreak of war but which were trans-shipped after the outbreak of the war to a Dutch ship in a Spanish port and consigned to a Dutch firm in the Netherlands, Sir Samuel Evans, adverting to the Order in Council of October 29, which he said was intended to operate only in favor of *bona fide* neutral owners, concluded:

"I also adhere to what I have said in other cases that a named consignee is a *bona fide* consignee in the ordinary business and commercial sense, and that a person who acts merely as a conduit pipe or channel for the purpose of enabling the goods to reach the enemy direct, and who merely lends himself or his name as an intermediary or instrument for that purpose, whether for great, small, or no remuneration, is not such a person as was intended by the term 'named consignee.' A sham or dummy consignee, although an existing person, is not such a one as was contemplated by the Order."

The judgment was affirmed by the Judicial Committee. So in the case of the *Tysla*,[3] a Norwegian vessel bound from Rio de Janeiro laden with animal foodstuffs consigned to a firm in Norway "with options," Sir Samuel said:

[1] Compare the following from a memorandum of the British Foreign Office (April, 1916) accompanying a note to the American Ambassador at London:

"The circumstances of a large number of these shipments negative any conclusion that they are *bona fide* shipments for the importing countries. Many of them are made to persons who are apparently nominees of enemy agents, and who never figured before as importers of such articles. Consignments of meat products are addressed to lightermen and dock laborers. Several thousands of tons of such goods have been found documented for a neutral port and addressed to firms which do not exist there. Large consignments of similar goods were addressed to a baker, to the keeper of a small private hotel, or to a maker of musical instruments. Will it be contended that such imports ought to be regarded as *bona fide* shipments intended to become part of the common stock of the country?" *Supp.* to 10 *Amer. Jour. of Int. Law*, p. 130. As to "dummy" consignees and "conduit pipes" see the article by Sir Erle Richards cited above, p. 25.

[2] VI Lloyd 181; II Br. & Col. Pr. Cas. 507. [3] V Lloyd 433.

"These goods were sent nominally to people who are, according to the evidence before me, agents for the German government and conduit pipes for the transmission of such goods as these to Germany. It is well known that the Germans would be very glad to be provided with large quantities of material of this kind for the purpose of feeding their horses—a purpose which is directly concerned with the operations of war. Upon the evidence before me, it would not be a violent presumption to say that these goods were on their way through these agents to German territory for the use of the German forces. Upon that ground also the goods, being conditional contraband, are confiscable."

Similarly, in the case of the *Liv and Other Vessels*,[1] Sir Samuel held that various parties in Scandinavian ports to whom a quantity of conditional contraband (coffee) had been consigned were "mere intermediaries" for the forwarding of the goods to Germany and consequently the goods must be considered as having a hostile destination.

In the case of the *Louisiana*, the *Tomsk*, the *Nordic*, and the *Joseph W. Fordney*,[2] the Judicial Committee, affirming the judgment of the Prize Court, laid it down that according to Article 35 of the Declaration of London as modified by the Order in Council of October 29, 1914, the ship's papers must show a consignee, to whom the consignor has parted with the real control of the goods, and not a mere agent for an undisclosed principal, bound to act as that principal may direct. "In no one of the present appeals," said their Lordships, "would the named consignee have had any real control over the goods consigned to him. In each case the named consignee was a mere agent for some one else and bound to act as that some one, whoever he might be, should direct." [3]

Replying to the argument of the appellants that none of the goods were consigned "to order," that the bill of lading in every case stated who was the consignee and that neither the bill of lading nor any of the ship's other papers showed in any instance a consignee in enemy territory, Lord Parker said:

"Their Lordships are of opinion that this contention cannot be sustained. It assumes that the words 'if the ship's papers do not show a

[1] VII Lloyd 86. [2] V Lloyd 248: III Br. & Col. Pr. Cas. 60.

[3] The *Fordney* was an American vessel against the seizure of the cargo of which the United States government protested on the ground that the vessel was loaded under the supervision of British consular officers in the United States, that its cargo consisted entirely of cattle fodder consigned to a firm in Sweden and that attached to the bill of lading was an affidavit as to its character and destination and a certificate of the Swedish consul to the effect that the re-exportation of such goods from Sweden was forbidden. See the correspondence between the British and American governments relative to the case in *Supp.* to 10 *Amer. Jour. of Int. Law*, pp. 151 ff.

consignment of the goods' mean 'if the ship's papers do not show consignee of the goods.' But on this interpretation there is no difference between the first case and the second, for a bill of lading which does not show a consignee is in effect for present purposes a bill to order. Further, the reason for not waiving the doctrine of continuous voyage in the case of consignments to order can only have been that in the case of such consignments the shipper retains the control of the goods, and can alter their destination as his interests may dictate or circumstances may admit. This control may, however, be retained by the shipper, even if he consigns to a named person, providing the consignee be bound to indorse or otherwise deal with the bill of lading as directed by the shipper. It would be useless to retain the doctrine of continuous voyage in the case of consignments to order if the shipper could escape the doctrine by consigning to a clerk in his office and procuring the clerk to indorse the bill. He would in this manner retain as full control of the goods as if the consignment had been to order. It is impossible, in their Lordships' opinion, to construe the Order as an intimation to neutrals that, provided they make their consignment to named persons not residing in territory belonging to or occupied by the enemy, they may, in the case of conditional contraband, safely disregard the doctrine of continuous voyage. If the Order were so construed, the modification of article 35 would be absolutely useless, and conditional contraband could be supplied to the enemy government through neutral ports as freely as if the 35th article had been adopted without any modifications at all."

This view was reaffirmed by the Judicial Committee in the case of the *Urna*,[1] where their Lordships held that an agent in Denmark to whom the goods were consigned and who was to sell them was not a "consignee" in the sense of the Order in Council, it being shown in this case that he was not a person to whom the consignors (American shippers) had parted with the real control of the goods. The same conclusion was reached by the Prize Court and by the Judicial Committee in the case of the *Norne and Other Vessels*,[2] where it was held that the consignees, a firm of fruit dealers in Rotterdam to whom a quantity of oranges was consigned by a fruit grower in Spain were not consignees within the sense of the Order in Council, since they did not have the real control of the goods upon arrival. "Sales agents whose authority is revocable by the consignor are not," said the Court, "consignees who have a real control of the goods consigned."[3]

[1] IX Lloyd 104; III Br. & Col. Pr. Cas. 595.
[2] IX, *ibid.*, 402; III, *ibid.*, 977.
[3] Other cases in which the Prize Court applied the rule that the ship's papers must show a consignee other than the consignor, to whom the latter had parted with the control of the goods, may be mentioned the *Kronprinsessin Victoria* (VII Lloyd 264); the *Hellig Olav* (VI Lloyd 153), and the *Maracas* (VI Lloyd 257).

Sec. 409. Consignments to Enemy Fortified Places and Bases of Supplies. The fifth presumption established by the Declaration of London is that conditional contraband consigned to an enemy fortified place or place serving as a base of supplies, has a hostile destination and is therefore liable to condemnation. The German Prize Court was frequently called on to determine whether particular English ports or places fell within either of these categories. In reaching its decisions it was governed by the view of the general staff of the admiralty as to whether they were fortified or served as bases or not. Thus in the case of the *Maria*,[1] the lower court at Hamburg in holding that Belfast was a "fortified place" stated that an official communication dated August 17, 1914, had been received from the chief of the admiralty staff to the effect that Belfast was such a place and that this communication coming from the highest command could not be questioned by the Prize Court. Upon appeal the supreme court affirmed the judgment and also held that Dublin was a base of operations and of supply. It added: "Whether this holding [the decision of the lower court] should be concurred in need not be considered, since in the meantime an official declaration has been received from the chief of the admiralty staff, according to which Dublin has, since the beginning of the war, also served as a base of operations and supply for the English forces." [2]

Among the places which were held to be either "fortified" or serving as a "base" were Hull, Belfast, Dublin, Falmouth, Plymouth, Queenstown, Leith, London, Liverpool, Southampton, and Johannesburg and other South African ports. On the other hand, Canterbury, Turnbridge, Brighton, Greenwich, Penarth, Croydon, Port Soudan, Karachi, Delagoa Bay,[3] Chinda, Natal, Beira, and the French island Réunion were held to be neither fortified or serving as bases of operations or supply.[4] When the destination of the goods was not the same as that of the ship or where there was uncertainty as to the destination of the goods, the destination of the ship was held to be decisive.[5] The Austrian Prize Court treated Antivari (Montenegro), Marseilles, San Giovanni di Medua, Durazzo and Alexandria as either forti-

[1] I *Entsch.* 45; Fauchille et De Visscher, *Jurispr. All.* 34.
[2] To the same effect see the cases of the *Batavier V* (Fauchille et De Visscher 90) and the *Zaanstroom* (I *Entsch.* 118).
[3] The lower court at Hamburg had held this neutral port to be a base of supplies but it was overruled by the supreme court (see the *Zaanstroom*).
[4] Many cases are cited by Verzijl, *op. cit.*, p. 794.
[5] The *Zaanstroom* (*supra*) and the *Semantha* (I *Entsch.* 188).

fied or serving as bases of revictualment.[1] In the case of the *Constantinos*,[2] the procurator for the British government filed evidence to prove that Smyrna was a fortified place and that certain foodstuffs destined thereto should be condemned. Judge Cator admitted that there were troops in the town and that it was defended although it was, he said, primarily a great commercial center and in no sense a fortress or naval arsenal. Yet he thought the Crown had so far established its case that it rested with the claimants according to Article 33 of the Declaration of London to show that the goods were not destined to the enemy government but for private consumption—a burden which they were able to discharge to the satisfaction of the Court.

Lübeck,[3] Hamburg,[4] and Stettin[5] were held by the British Prize Court to be bases of supply for the German forces even after the armistice.

Sec. 410. Presumption in Case of Consignments to Order. The Declaration of London does not enumerate among the presumptions of hostile destination the fact of consignment of goods "to order" but before the war was very far advanced Great Britain, France, Italy and Germany by orders or decrees introduced such a presumption. In fact already before that had been done the prize tribunals of Great Britain and France took into consideration such circumstance when it existed and attached great importance to it. Thus in the case of the *Kim, Alfred Nobel, Björnstjerne Björnson,* and *Fridland,* the fact that the cargoes were consigned "to order" was considered as creating a strong suspicion of hostile destination even in the case of those consignments to which the Order in Council of October 29, 1914 (which formally created the presumption) did not apply by reason of the fact that the goods were shipped prior to the promulgation of the Order. Sir Samuel Evans based his decision largely on the view adopted by the United States Supreme Court during the American Civil War. As to this, he said:

"Another circumstance which has been regarded as important in determining the question of real or ostensible destination of the neutral port was the consignment 'to order or assigns' without naming any consignee. In the celebrated case of the *Springbok* (5 Wall. 1) the Supreme Court of the United States acted upon inferences as to destination (in the case of blockade) on this very ground.

[1] Cases cited by Verzijl, p. 797.
[2] I Br. & Col. Pr. Cas. 140.
[3] The *Hakan*, V Lloyd 161.
[4] The *Prins Der Nederlanden* No. 2 (VI Lloyd 205) and the *Liv and Other Vessels* (VII, *ibid.*, 102).
[5] The *Rannveig* (IX Lloyd 380).

"The same circumstance was also similarly dealt with in the *Bermuda* (3 Wall. 514) and in the *Peterhoff* (see Blatch. Pr. Cas. 463, at p. 540, and 5 Wall. 28).

"I am not unmindful of the argument that consignment 'to order' is common in these days. But a similar argument was used in the *Springbok* (5 Wall. 1) supported by the testimony of some of the principal brokers in London to the effect that a consignment 'to order or assigns' was the usual and regular form of consignment to an agent for sale at such a port as Nassau. The British government was petitioned to intervene for the shippers, but upon this point the British Foreign Office said that 'no doubt the form was usual in the time of peace, but that a practice which might be perfectly regular in time of peace under the municipal regulations of a particular State would not always satisfy the law of nations in time of war, more particularly when the voyage might expose the ship to the visit of belligerent cruisers'; and added that, 'having regard to the very doubtful character of all trade ostensibly carried on at Nassau during the war in the United States, and to many other circumstances of suspicion before the Court, Her Majesty's government are not disposed to consider the argument of the Court upon this point as otherwise than tenable.'

"The argument still remains good, that if shippers after the outbreak of war consign goods of the nature of contraband to their own order, without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course it is not conclusive. The suspicion arising from this form of consignment during war might be dispelled by evidence produced by the shippers."

Regarding those shipments on three of the vessels which were made after the promulgation of the Order in Council of October 29 and to which therefore the presumption laid down by it undoubtedly applied, Sir Samuel held that since they were consigned to the order of the shippers or that of their agents they must be presumed to have had a hostile destination and the onus of proving the contrary had not been discharged by the claimants. They were therefore confiscated as lawful prize.

Likewise the French Prize Council in the case of the *Nieuw-Amsterdam*,[1] decided in February, 1915, before the French decree establishing the new presumption had been issued, held that while in principle it was incumbent upon the captor to prove hostile destination in the case of conditional contraband consigned to a neutral port, it could not be required when the bills of lading were made out to the order of the shipper, since the captor would have no means of doing so, and consequently it belonged to the

[1] Fauchille, *Jurispr. Franc.* 15. See also the case of the *Gorontalo* (*ibid.*, 72) and the *Banda* (*ibid.*, 90).

Prize Council to endeavor to ascertain from the circumstances the real destination. In this case the goods being consigned to a Dutch port the latter must be assimilated to German ports in consequence of the Rhine Convention of October 17, 1868, under which goods laden on ships destined to Dutch ports may be freely transported on the Rhine to German ports. But the decision was overruled by the Council of State apparently on the ground that the decree of November 6, 1914, laying down the new presumption relative to consignments to order was not applicable in this case because the seizure had taken place prior to its promulgation, and that there was no evidence to show that the goods, shipped as they were before the outbreak of the war, although consigned to order, had a hostile destination which would justify their capture as contraband of war.[1]

The German Prize Court appears not to have applied the presumption relative to consignments to order until after it had been formally added to the prize ordinance (March 18, 1915), although in the case of the *Maria* the fact that the bill of lading was made out "to order" was referred to as strengthening the inference that the goods might ultimately find their way into the hands of the British authorities. After the introduction of the rule into the prize code it was regularly applied in the cases which came before the Prize Court.[2]

Although the Italian government did not formally put into effect the new presumption until March, 1917, when it promulgated general rules relative to the exercise of the right of capture, the Prize Commission, relying upon the decree of June 3, 1915, article 4 of which established the liability to capture of contraband [3] in case the papers did not indicate who was the consignee, virtually applied the presumption. Thus in the case of the *Kyzicos*,[4] it held that the above mentioned article "excluded not only bills of lading to bearer but also bills of lading to order, if the latter permitted with more security than the former the circulation of goods, not indicating the person who has the right

[1] To the same effect see the *Jiul* No. 1 (*ibid.*, 26), and the *Oranje Nassau* (*ibid.*, 77), where it was held that conditional contraband goods shipped before the outbreak of war, although consigned to the order of the shippers in a neutral port did not have an enemy destination. See also the *Insulinde* (*ibid.*, 21), where the ship sailed the day after the proclamation of contraband, and the master was assumed not to know that the goods were on the list of contraband.

[2] See, among others, the *Brage* (I *Entsch.* 267), the *Lupus* (*ibid.*, 377), the *Gelderland* (II, *ibid.*, 211) and the *Blommersdijk* (II, *ibid.*, 108).

[3] Text in Fauchille et Basdevant, *Jurispr. Ital.*, *Annexe*, p. X.

[4] *Ibid.*, 57.

to their delivery."[1] After the putting into effect of the rules of March 25, 1917, Article 46 of which introduced the presumption relative to hostile destination in the case of consignments to order, the Prize Commission regularly applied the new rule.[2]

Sec. 411. Interpretation of Term "Consignments to Order." In the case of the *Kim and other vessels* counsel for the claimants argued that the words employed in the Order in Council of October 29, 1914, "if the goods are consigned to order" meant "to the order of the consignor" only and did not apply to the case of goods consigned to the consignee or his order. The point was also made that in many of the consignments in this case the bills of lading were not made out "to order" simply but to branch houses or agents of the shippers. Regarding this contention, Sir Samuel Evans said he did not consider the distinction material. "All the goods claimed by the shippers on the *Kim,*" he said, "were consigned to their own order or to the order of their agents (which is the same thing) and not to any independent consignee." The German Supreme Prize Court interpreted consignments "to order" to include those the bills of lading of which provided that the goods should be delivered to a named person or his order.[3] Likewise the French Prize Council interpreted consignments the bills of lading of which made the goods deliverable to a named person or his order to be the same thing as consignments "to order" and therefore susceptible of being transferred by endorsement.[4] It further held that where one of three bills of lading which designated named consignees was endorsed in blank and therefore transferable, the consignment must be regarded as "to order" and consequently within the purview of the decree relative to such consignments.[5] The Italian

[1] See also the case of the *Ismine No. 1* (*ibid.*, 192).

[2] See among others the case of the *Ismine* (cargo), Oct. 18, 1919, *ibid.*, 409.

[3] The *Lupus* (I *Entsch.* 377). The goods in this case were consigned to the Netherlands Overseas Trust or its order. The claimants argued that the N. O. T. was the real consignee and therefore the destination was not hostile. But the Prize Court held that destination to the N. O. T. afforded no guarantee against re-exportation of the goods to England. See also the similar case of the *Johanna* (I *Entsch.* 302); also the *Marietta di Georgio* (*ibid.*, 156), where the claimants argued without success that such consignments should not be considered as consignments "to order" properly speaking.

[4] The *Eir.* Fauchille, *Jurispr. Franc.* 32. To the same effect see the *Insulinde* (*ibid.*, 21) and the *Achilleus* (27 *Rev. Gen.* 35).

[5] The *Sibilla* (*ibid.*, 178). It was the same where the consignment was "to order" and only one of the bills of lading and an invoice, which did mention the name of the consignee, were produced. (The *Boeroe*, *ibid.*, 53) and where there was no bill of lading or manifest (the *Nicolaos Canellopoulos*, *ibid.*, 339). See also the *Karimata* (*ibid.*, 63), the *Barcelo* (*ibid.*, 412), the *Kirkoswald* (*ibid.*, 441), and the *Nuevo Ampurdanas* (*ibid.*, 481).

Prize Commission likewise held that consignments in which the bills of lading designated the shipper or one of his employers as the consignee must be assimilated to consignments "to order." [1] It also held that the Italian decree (of June 3, 1915), not only applied to consignments to the bearer of the bill of lading and to his order but also those in which the shipper was designated as the consignee, unless in the latter case it was not proved that the shipper had an established house or an agent in the port of delivery.[2]

Sec. 412. Presumption of Hostile Destination When Papers Do Not Indicate Consignee. Consignments to the N.O.T. and Similar Bodies. All the Prize Courts applied the rule that where the papers did not indicate who was the consignee, hostile destination must be presumed. The German Prize Court even treated consignments to organizations established in neutral countries for the purpose of receiving and guaranteeing the non-exportation to belligerent territory of overseas importations, such as the Netherlands Overseas Trust and the Swiss *Société de Surveillance Economique,* or their order, as having a presumably hostile destination, this on the assumption that they were not the real and final *destinaires.* In the case of the *Lupus* (*supra*) where a cargo had been consigned to the N.O.T. or its order the Prize Court said

"the legal presumption of Article 30 of the prize ordinance is therefore realized. It must in consequence be admitted that in the absence of circumstance proving the contrary that the goods would find their way to enemy territory or the enemy armed forces. The claimants were wrong in relying on the fact that the goods were consigned to the N.O.T. They allege that the esteem in which those who direct that society are held, is sufficient guarantee that the goods consigned to it would not be re-exported from the Netherlands. But the contract between the importers and the N.O.T. does not interpose the least obstacle to the re-exportation of the goods to England. Moreover . . . if the British authorities demand that goods imported into the Netherlands be sent to England to be subjected to decision of the Prize Court that will have to be done."

The N.O.T., it added, was not an organization which was engaged in commerce; it had no interest itself in goods consigned to it but only in delivering them to the importer and since the ship's papers did not indicate who this was, the legal presumption of hostile destination existed.[3]

[1] The *Kyzicos*, Fauchille et Basdevant, *Jurispr. Ital.* 58.
[2] The *Ismine* (cargo), (*ibid.*, 192).
[3] In the same sense see, among others, the cases of the *Pomona* (II *Entsch.* 147) and the *Lestris* (I, *ibid.*, 396). In the latter case the Court

The French Prize Council, on the contrary, did not regard consignments to such organizations as the N.O.T. and the Swiss *Société de Surveillance Economique* as having a presumed hostile destination but rather as *prima facie* innocent. Nevertheless when the circumstances were such as to establish the bad faith of the society and that it was acting as a mere intermediary for getting contraband into Germany, hostile destination was presumed and the burden of proof to show the contrary was placed upon the claimant.[1]

The Italian Prize Commission adopted the same view and released a cargo of conditional contraband shipped on an Italian vessel from Buenos Aires and consigned to the Swiss *Société de Surveillance Economique* for consumption in Switzerland but in the place of which consignee was substituted after the sailing of the vessel another consignee, namely, a merchant in Genoa. The Commission held that while the substitution of a new consignee in the place of the original consignee during the course of the voyage created a presumption of hostile destination according to the Rules of 1917 Relative to Capture (art. 46) the circumstances in this case showed that the real destination was not hostile.[2]

The British Prize Court likewise refused to regard consignments to the N.O.T. as necessarily having an innocent destination. In the case of the *Noordam*,[3] where the goods had been sold to a firm in Amsterdam but consigned to the N.O.T., Lord Sterndale, while admitting that the latter was doing all it could to prevent the export to Germany of goods consigned to it, stated that it had not always succeeded. The real question was what was the ultimate destination of the goods. If they had arrived at Amsterdam they would, he said, have been delivered to the purchasers who would have had control of them and in his opinion it was their intention to send the goods to Germany. He concluded: "It seems to me that, if that be so, it cannot be

held that hostile destination must be presumed in the case of conditional contraband destined to a neutral port if the consignment was "to order" or to a consignee the identity of whom could not be established by the papers and that this was especially the case when the consignment was to the Netherlands Overseas Trust. But in this case it was held that the presumption of hostile destination must be considered as being destroyed because it resulted from the documents that the enemy government had authorized the importation into Holland of the goods in question. To the same effect see also the case of the *Blommersdijk* (II, *ibid.*, 108).

[1] See especially the cases of the *Kirkoswald No. 2* (Fauchille, 441), the *Nuevo Ampurdanas* (*ibid.*, 481), the *Tiber* (*ibid.*, 414) and the *Cadorna* and other vessels (27 *Rev. Gén.*, 1920, *Jurispr.* 100.

[2] The *Garibaldi* (Fauchille et Basdevant, *Jurispr. Ital.*, 248).

[3] VIII Lloyd 337; III Br. & Col. Pr. Cas. 317.

said that there is not an enemy destination simply because some association, such as the N.O.T. Co., would do all they could to frustrate it." In the case of the *Prins der Nederlanden,* Lord Sterndale said as to such consignments:

"What is relied on very strongly is this, that these goods were consigned to the Netherlands Overseas Trust, and that that of itself really is enough to protect the transaction, because the precautions taken are such that goods cannot get to a wrong destination whatever the real owner of them may be, if they pass through the N.O.T. That was a contention that came before me quite recently in the case of the *Noordam* and I did not see my way to adopt it. I did not see my way to adopt it for this reason, that I have had several cases before me personally—and I have seen reports of other cases before the late learned President —in which parties have been heavily fined by the N.O.T. for getting goods through to Germany in breach of the contract and undertaking which those parties had given to the N.O.T. No doubt those persons were caught and they suffered for it, and they run the risk of suffering for it if they do it. But those instances are quite sufficient to show that it is no absolute guarantee. The N.O.T. will do their best, but they do not always succeed and I think it is not an unreasonable assumption that if some persons have been caught in certain cases, there are other cases in which they have not been caught. . . ."[1]

In the case of the *Oranje Nassau and Other Vessels,*[2] where Lord Sterndale was called upon to decide whether a consignment to the N.O.T. was a consignment to "named" consignees in the sense of the British Order in Council of October 29, 1914, he held that it depended upon the facts of each particular case and that if the N.O.T. received the consignments as agents for consignees or persons who bought the goods and who had the control over their ultimate destination the goods would not be liable to condemnation whatever their ultimate destination. But in this case it was held that the N.O.T. was merely receiving the consignments as agents for the consignor who was free to dispose of them as he might direct and consequently they must be regarded as having a hostile destination.

Sec. 413. Hostile Destination Presumed When Imports into Neutral Country Adjacent to Enemy Territory Largely Exceeded Pre-War Importations. The French decree of July 7, 1916, formally established the presumption of hostile destina-

[1] See also the case of the *Zaanland and Other Vessels* (X Lloyd 343), where Sir Samuel Evans condemned certain goods consigned to the N. O. T. for a Dutch firm which "acted only as channels through which the goods were intended by all the parties concerned to be sent to Germany and the ship's papers did not disclose the real consignees and purchasers."

[2] IX Lloyd 189; III Br. & Col. Pr. Cas. 638.

tion in the case of absolute contraband laden on a ship destined to the ports of a neutral country adjacent to enemy territory when the imports into the neutral country were largely in excess of the normal pre-war importations and the circumstances indicated an ultimate destination to enemy country. In the case of the *Tiber*,[1] the French Prize Council applied the provisions of this decree and condemned a cargo of wine and spirituous liquors shipped from Spain to Denmark, for the reason that whereas the normal pre-war importations of such commodities into Denmark and the re-exportations therefrom amounted to only 4,318 metric tons per year the importations for the year 1916 were eight times as great. But in the case of the *Iberia*,[2] it refused to condemn a quantity of bisulphate of carbon, dried fruits, wine and oil consigned to a Swedish port, for the reason that the statistics did not show that the importations of such goods into Sweden during the year 1916 were sufficiently in excess of the pre-war importations to justify in itself the presumption of ulterior enemy destination, especially in view of the measures taken by the Swedish revictualling commission to prevent the re-exportation of such imports.

While the British government did not by Order in Council formally establish the presumption of hostile destination in such cases it was in fact introduced by the Prize Court and was relied upon by the government in its reply to the complaints of neutrals.[3] Thus in the case of the *Kim and Other Vessels*, Sir Samuel Evans emphasized that Denmark, the country to which the goods in this case were consigned, was a "country with a small population of less than three millions, and is, of course, an exporting country as regards foodstuffs, and not an importing country"; that its situation rendered it convenient to transport goods from its territory to German ports; and that the quantity of lard on the four vessels in question consigned to Copenhagen was thirteen times as great as the quantity which had been imported into the whole country for each of the three years prior to the war. The Court quoted similar statistics regarding the abnormal importations of lard into other Scandinavian countries since the outbreak of the war. "These facts," Sir Samuel said in conclusion, "give practical certainty to the

[1] Fauchille, *Jurispr. Franc.* 414. [2] 27 *Rev. Gén.* (1920), *Jurispr.* 22.
[3] See notably the communication of Sir Edward Grey to the American Ambassador at London, February 10, 1915, *Supp.* to 9 *Amer. Jour. of Int. Law*, especially pp. 68 and 81, where statistics of disproportionate importations into neutral countries adjacent to Germany were given and relied upon as evidence of hostile destination.

inference that an overwhelming portion (so overwhelming as to amount to almost the whole) of the consignments of lard in the four vessels we are dealing with, was intended for, or would find its way into Germany," though he admitted that these facts in themselves were not conclusive as to hostile destination. Similar facts were relied upon by the Prize Court in the case of the *Kronprinzessin Victoria* [1] for the condemnation of a quantity of coffee consigned to a Swedish port. Statistics were produced to show that there had been a large increase of imports of coffee into the Scandinavian countries since the outbreak of the war and that there had been a corresponding increase of re-exportations to other countries. It was shown that the appellants in this case had multiplied their imports of coffee at least six times over since the outbreak of the war. The Judicial Committee [2] affirmed the judgment of Sir Samuel Evans that the goods had a hostile destination and that the admissibility of "statistical" evidence was entirely proper, though for other reasons the Judicial Committee held that the goods were immune from condemnation, notwithstanding their ulterior enemy destination. In the case of the *Urna*,[3] Lord Sterndale condemned a quantity of dried fruit consigned by American shippers to an agent in Denmark, on the ground that the statistics produced by the Crown showed that the imports of such goods into Scandinavian countries had greatly increased during the war and were largely in excess of the needs of the population. The onus under these circumstances, he said, was on the claimants to show that the goods did not have an ultimate German destination and this burden they were unable to discharge to the satisfaction of the Court. The judgment was affirmed by the Judicial Committee, which declared that "there is ample statistical evidence to place an obligation on the appellants to show that the destination of the goods is innocent." [4]

Sec. 414. Inferences Resulting from Enemy Government Control of Food Supplies. The action of the German government in assuming control through various measures of the

[1] VII Lloyd 230. [2] VII Lloyd 246; III Br. & Col. Pr. Cas. 247.
[3] IX Lloyd 104.
[4] IX, *ibid.*, 112; III Br. & Col. Pr. Cas. 595. See also to the same effect the case of the *Andjik*, where the Prize Court condemned a quantity of honey consigned to a Dutch port, it being shown that in the year 1914 the exports of honey from Holland being only 16 tons to Germany and 48 tons to Belgium, whereas in 1915 they amounted to 448 tons to Germany and 200 tons to Belgium. Holland, it was said, "was an entreport for the supply of honey to Germany, honey which was derived from overseas sources."

distribution of food supplies and other articles on the contraband list imported into the country was considered by the governments of Great Britain and France as having had the effect of undermining the rule which made a distinction between goods intended for the enemy government or its armed forces and those intended for the use of the civilian population. Adverting to this situation, Sir Edward Grey, in a note to the American Ambassador at London, on Feb. 10, 1915,[1] said:

"The reason for drawing a distinction between foodstuffs intended for the civil population, and those for the armed forces or enemy government disappears when the distinction between the civil population and the armed forces itself disappears. In any country in which there exists such a tremendous organisation for war as now obtains in Germany, there is no clear division between those whom the government is responsible for feeding, and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German government have taken control of all the foodstuffs in the country."

Sir Samuel Evans in the case of the *Kim*, referring to this statement, added:

"It was given in evidence that about ten millions of men were either serving in the German army or dependent upon or under the control of the military authorities of the German government out of a population of between sixty-five and seventy millions of men, women, and children. Of the food required for the population it would not be extravagant to say that at least one-fourth would be consumed by these ten million adults. Apart altogether from the special adaptability of these cargoes for the armed forces, and the highly probable inference that they were destined for the forces, even assuming that they were indiscriminately distributed between the military and civilian population, a very large proportion would necessarily be used by the military forces."

He concluded therefore that in these peculiar circumstances where the armed forces of the enemy constituted so large a proportion of the population and where there was so little distinction between shipments on private account and on government account, it was "most reasonable" that the burden of proving innocent destination should be placed on the claimants.

In the case of the *Esrom* [1] Lord Sterndale condemned a quantity of cocoa beans (conditional contraband) consigned to Scan-

[1] *Supp.* to IX *Amer. Jour. of Int. Law*, p. 80. [1] VIII Lloyd 492.

dinavian ports, on the ground that considering the measures taken by the German government with the view to effective control over the sale and distribution of such goods it was "extremely likely" that they would find their way to the armed forces of Germany. Likewise, in the case of the *Hakan*[1] the Prize Court held that a cargo of salted herrings (conditional contraband) consigned to the German port of Lübeck, must be considered as destined for the German government or its armed forces, in consequence of the fact that certain orders had been issued by the German government providing that such commodities when imported from abroad should be delivered to a company established by the government to act under the direction of the Imperial Chancellor for the purpose of controlling the distribution of food supplies. In affirming the judgment the Judicial Committee through Lord Parker stated that it was quite certain that the persons to whom the goods were consigned were bound to hand them over to the company; the effect was therefore equivalent to requisition by the government. He admitted that possibly they would have been devoted to the feeding of civilians and it might be true that the rations of the armed forces never included salted herrings but their rations of bread and meat might well be increased by reason of the use of fish to feed the civilian population. Under these circumstances, the inference was "almost irresistible" that the goods were intended to be used for "warlike" purposes and were therefore rightly condemned.

The French Prize Council likewise in a number of cases based its conclusions wholly or in part on the fact that the government of the enemy country (Germany or Austria-Hungary) to which the goods were found to be ultimately destined, had taken measures to insure control over the distribution and use of domestic or imported food supplies.[2]

Sec. 415. Proof in Rebuttal of the Presumption of Hostile Destination. German Decisions.[3] Where a legal presumption of hostile destination exists it is of course open to the claimants to produce proof to the contrary. In a large number of cases the Prize Courts were called upon to determine in par-

[1] V Lloyd 161; II Br. & Col. Pr. Cas. 210, 479.

[2] See among others the *Nieuw Amsterdam* (Fauchille, *Jurispr. Franc.* 14), the *Sibilla* (*ibid.*, 218), the *Narrovian* (*ibid.*, 68), and the *Oscar II* (27 *Rev. Gén., Jurispr.*, 86).

[3] The general subject of burden of proof is discussed in Secs. 84-85; 330-331; 396, *supra*.

ticular instances whether the proof offered was sufficient to overcome the legal presumption. In the case of the *Zaanstroom* [1] the German Supreme Prize Court held that where goods, conditional contraband, were destined to an enemy base of operations or supply the proof must *à priori* be considered as made that the goods would serve the use of the armed forces if they reached their destination and the burden was on the claimant to establish the contrary. It further held that this burden was not discharged by establishing merely that at the time of seizure the goods had not yet been destined or intended for the use of the government or its armed forces. It was necessary to prove by the facts that according to the normal course of events the goods would not ultimately be used for hostile purposes.[2] The matter was discussed at length by the German Prize Court in the case of the *Maria* [3] where it was a question of wheat destined to Belfast and Dublin. The Imperial Commissioner contended that even if the immediate destination were not the British government or the armed forces there was nothing to prevent the government from requisitioning the wheat upon arrival and using the flour made from it to feed the armed forces. The claimant, on the other hand, argued that the test of liability to capture was not the possible ultimate use but whether it was destined to the enemy. If this were not the correct test, the proof which was allowed in rebuttal of the presumption would be an impossibility. The Prize Court rejected the contention of the appellants and held that it was not the place of destination but the ultimate use of the goods which was decisive. As to the matter of proof to the contrary the Court said:

"Proof in rebuttal, it is true, may be offered, but it is not sufficient to prove that at the time of seizure the aforesaid disposal of the goods had not yet been made; for, just as in cases in which the legal presumption does not come into operation and the proof of the hostile destination is not confined to facts which had already occurred at the time of seizure, so the content of the presumption can likewise not be subject to such a restriction. Otherwise, it would be most easy to avoid the seizure of conditional contraband by abstaining from giving the

[1] I *Entsch.* 118; Fauchille et De Visscher. *Jurispr. All.* 98.

[2] But see the case of the *Modig* (I *Entsch.* 41), where it was held that a consignment of coal destined to the municipal gas works of Helsingfors could not be considered as having a hostile destination even though it might upon arrival be requisitioned by the enemy government and used for war purposes. The mere possibility that the enemy government might requisition the coal and use it for war purposes was not sufficient to establish hostile destination; nothing but actual proof of such eventual use would be sufficient. Compare also the case of the *Medea* (*ibid.*, 131).

[3] I, *ibid.*, 45. See also Secs. 409, 410, *supra.*

goods in the last instance may be a purely local destination. Whether or not proof to rebut [illegible] can only depend on consideration of the facts of each individual case. It also depends on the kind of cargo and how important under existing circumstances it might be for the armed forces of the state and consequently upon the probability that the enemy government would acquire it. In the prize cases of the Alfred Fliess etc., the Court declared the presumption rebutted because proof was submitted which established that the cargoes consisting of condensed milk actually sold on the spot where they were required and would have to be used and consumed, and the Court could not refrain from holding that the cargoes would have been actually used by persons entirely as intended. The present case is entirely different. The only actual fact is that at some time before the outbreak of the war the wheat was sold and shipped to an English consignee. As to the [illegible] there is only assurance of the purchasers that they were not acting on instructions or anything of the sort, and that it was their business to sell the wheat to mills in the neighborhood of their purchase in order to meet their normal requirements. This may be taken as the literal truth, but it would still be absolutely uncertain where the wheat would really have gone to apart from the fact that after all the point is not where the corn is ground but for whom and for what the flour is intended."

In various cases the German Prize Court held that where contraband goods were consigned to persons in neutral territory, establishment of the fact that the neutral consignee had already sold the goods to other neutral purchasers was not regarded as sufficient proof to rebut the legal presumption.[1] But it was admitted that where contraband goods were consigned to an enemy fortified place which was a base of supplies the presumption did not apply if the goods had been sold in advance in a place offering in itself a serious guarantee that they would not be used for hostile purposes.[2]

Where the legal presumption of hostile destination existed, as where a cargo of contraband laden on a vessel bound for a Dutch port and which had been captured and released by the British Naval authorities on condition that the goods be returned to London (a fortified place and a base of supplies) and put

[1] Among others see the *Norden* (II *Entsch.* 35).

[2] The *Medea* (I *Entsch.* 31). The consignment here was a cargo of oranges destined to London. The Court held that the legal presumption applied because the shippers in transferring the bills of lading deprived themselves completely of all power of control of the eventual disposition of the goods and thereby delivered them into the hands of enemy merchants who were subject to the power of the enemy government. The fact that oranges were not foodstuffs and did not constitute a part of the rations of English soldiers was not sufficient proof to rebut the legal presumption of hostile destination. Oranges were used for making marmalade which was served to English soldiers and the Court could not ignore the fact that the "taste for oranges was extremely developed among the English people."

at the disposition of the English Prize Court, the German Prize Court refused to consider as proof in rebuttal suggestions as to the possible decision of the British Prize Court. It likewise considered as superfluous the fact that at the moment of seizure the captain of the vessel had, because of bad weather and the danger from mines, abandoned his intention of going on to London, in consequence of which the goods had lost their hostile destination, since he was under an engagement to deliver the goods into the custody of the British Prize Court and would be obliged ultimately to fulfill his engagement.[1]

But in the case of the *Anvers*[2] the Prize Court refused to condemn a cargo of boards (conditional contraband) destined to London to be used for the manufacture of sugar boxes. The Court accepted as proof in rebuttal of the legal presumption, declarations made under oath that the boards were to be used for pacific purposes. The argument of the Imperial Commissioner based on the supposition that the enemy government might requisition them upon arrival for war purposes was not sufficient to justify condemnation. Such use by the government must be proven in order to establish hostile destination.[3] Similarly in the case of the *Alfred Hage*,[4] the Court refused to condemn a cargo of mining timber (conditional contraband) destined to an enemy fortified place because it was not proven that it was to be used by the enemy government for belligerent purposes. The mere possibility that it might be so employed was not considered to be sufficient proof of hostile destination in view of other circumstances. In this case the contrary proof had been produced that the timber was to be employed by private individuals in connection with the exploitation of their mines. Likewise in the case of the *Cocos*,[5] the Court refused to consider as having a hostile destination a cargo of conditional contraband consigned to an enemy base of supplies but which it was shown, could not in the natural course of things be resold by the last acquirers. The mere hypothesis that the enemy government might requisition it and employ it for war purposes was held to be too remote an eventuality to be taken into consideration.

On the other hand, in the case of the *Baldwin*[6] the Court refused to allow damages for the destruction of a cargo of wood (conditional contraband) intended for the boxing of preserves

[1] The *Oostzee* (I *Entsch.* 347).
[2] I, *ibid.*, 38
[3] To the same effect see the *Modig* (*supra*).
[4] I *Entsch.* 25; Fauchille et De Visscher 19.
[5] I *Entsch.* 141; Fauchille et De Visscher 107.
[6] I, *ibid.*, 385; *ibid.*, 218.

and vegetables because it was destined to an enemy manufacturer who was a notorious furnisher of preserves and vegetables to the enemy army and navy. In this latter respect the facts differed from those in the case of the *Anvers*, since there the consignee was not an important purveyor of supplies to the enemy government but a sugar refiner and sugar was less indispensable for the feeding of armies than were canned preserves and vegetables. In consequence the claimants had failed to rebut the presumption of hostile destination by contrary proof.

Sec. 416. The Same. Italian Jurisprudence. The Italian Prize Commission, in the case of the *Kyzicos* (cargo) [1] held that the burden of proof in rebuttal of the legal presumption of hostile destination was discharged when the claimants produced *bona fide* documents to show that the goods were destined to a friendly government. In this case it was a question of certain locomotives shipped on a neutral vessel and consigned to the Serbian government for use on the State railways. The evidence consisted not only of declarations made by officials of the Serbian government but original copies of letters and telegrams from the company which furnished the locomotives. In the same case dealing with the ship itself [2] the Prize Commission held that the decree of June 3, 1915, relieving the captor from the burden of proving hostile destination where the papers failed to show who was the consignee, had reference not to proof of innocent destination given to the goods by the sellers but by the owners, that is, in effect by the purchasers. In other words, contrary proof could, as a general rule, be furnished only by the owners of the goods and not by the sellers.

Sec. 417. The Same. British Decisions. In the case of the *Constantinos*,[3] the Prize Court for Egypt was called upon to deal with a consignment of foodstuffs destined to an enemy fortified place (Smyrna) and in which therefore the legal presumption of hostile destination existed. The Prize Court, however, accepted as proof to the contrary the fact that the ship was a small one, that the cargo consisted of a number of petty consignments and the production of affidavits declaring that the goods were not intended for the enemy authorities. Furthermore, before importing the goods the consignee had obtained guarantees from the chief military authorities in Smyrna that

[1] Fauchille et Basdevant, *Jurispr. Ital.* 1.
[2] *Ibid.*, 59.
[3] II Br. & Col. Pr. Cas. 140.

they would not be requisitioned. In view of these circumstances Judge Cator concluded:

"The point of view of all the correspondents is that of a petty trader considering his interests in that capacity. The affidavits have not been contradicted and are scarcely challenged, and I have no difficulty whatever in finding that so far as the goods are concerned they were intended only for the civil population of the town. Moreover, it is not suggested that at the time of this capture the armed forces of Turkey had become so merged with the civil population as to be indistinguishable, so that the questions discussed in the case of the *Kim* (P. C. i. 405) do not arise here."

In the case of the *Medan*,[1] which involved the question whether a quantity of American money (conditional contraband) sent by mail on a neutral vessel and addressed to private individuals residing at bases of supply in Germany and Austria-Hungary had a presumed enemy destination, Sir Samuel Evans held that under Articles 33 and 34 of the Declaration of London (which were in force at the time) the presumption did not arise. Adverting to those presumptions and the nature of proof in rebuttal thereof he said:

"Now that means, in my view, that they may be rebutted, not necessarily by evidence, but by any circumstances or facts which can be as strong as any evidence can be. Having regard to the nature of these remittances, and the persons to whom they were sent, I cannot come to the conclusion that the presumption arises that they were destined for the armed forces of the enemy. I think they were destined for these citizens of Germany personally, and they must be regarded as not coming within the category of conditional contraband."

But after having reached the conclusion that the money was not destined for the armed forces in the sense of the Declaration of London, he proceeded to apply the Reprisals Order in Council of March 11, 1915, the object of which was to prevent any and all articles from going to Germany, and held that since the money had an enemy destination and was enemy property, it must be detained until the conclusion of peace.[2]

Sec. 418. Neutral Embargoes Against Re-exportation Not Conclusive as to Innocent Destination. As is well known, the governments of various neutral States, particularly those of Denmark, the Netherlands, Norway, Sweden and Switzerland

[1] VII Lloyd 390.

[2] Verzijl (*op. cit.* 830) characterizes this opinion as a "curious" one in which the Court combats one presumption by others and where it admits and denies at the same time the existence of a presumed hostile destination.

under pressure from the British and French governments, placed embargoes on the re-exportation to belligerent territory of goods which were on the British and French contraband lists. In return for these interdictions they were allowed to import such goods from over the seas.[1] But notwithstanding the guarantees thus given against the re-exportation of contraband goods to enemy country the Prize Courts declined to recognize them as being conclusive of innocent destination. In the case of the *Louisiana and Other Vessels*,[2] which involved the question of the ultimate destination of cargoes of fodderstuffs shipped from the United States to Danish and Swedish ports, Lord Parker, speaking for the Judicial Committee which affirmed the judgment of condemnation pronounced by the lower court, said:

"It is true, no doubt, that the municipal laws of both Denmark and Sweden prohibit the export of fodderstuffs, but it is not clear that this prohibition includes trans-shipment at Danish or Swedish ports, or that licenses for export are not readily granted by the Danish or Swedish authorities, at any rate if the stuffs in question are not really needed for home consumption. The experience of the Prize Court during the war has made it clear that the laws referred to, however stringent, can be evaded."

It was therefore held that the cargoes on two of the vessels were destined for the German government. Even where there was a formal agreement between the neutral government and the belligerent relative to the quantity of goods which the former was authorized to permit to be exported, the British Prize Court sometimes confiscated the ship and cargo. In the case of the *Ranveig* (1920),[3] which involved the question of the ultimate destination of a cargo of salted herrings shipped on a Norwegian ship and which was captured in the course of transit by sea from a Norwegian port to the German port of Stettin, counsel for the shipowners invoked an agreement which had been made between the government of the United States and that of Norway, to which the allied powers assented, whereby Norway undertook not to export to the Central Powers or their allies foodstuffs of any kind, except fish and fish products not to exceed 48,000 tons per annum, and not more than 15,000 tons of which was to go to Germany and her allies in any three

[1] Some of these embargo lists may be found in *International Law Situations* for 1915, pp. 33 ff. On the Danish lists were some 250 articles; on the Dutch and Swiss lists about 200; and on those of Spain and Sweden about 500.

[2] V Lloyd 248; III Br. & Col. Pr. Cas. 60.

[3] IX Lloyd 380, 393; III Br. & Col. Pr. Cas. 740, 1013.

months. The surveillance of the exportations was left to the Norwegian government. Counsel for the shipowners contended that the agreement between Norway and the United States made with the assent of Great Britain had the effect of a treaty binding on the British government. But the Prize Court held that there was nothing in the agreement which showed an intention to authorize any trade which was inconsistent with neutrality and since the goods in this case were contraband of war they were not protected by the agreement. Both ship and cargo were accordingly condemned. As has been pointed out, the British, German and French prize tribunals on various occasions condemned cargoes consigned to neutral controlling agencies such as the Netherlands Overseas Trust, on the ground that the guarantees which they offered against re-exportation were not conclusive that the ultimate destination was innocent.[1]

III

Doctrine of Continuous Voyage

Sec. 419. View of the Prize Courts. Although the Declaration of London formally excluded the application of the doctrine of continuous voyage to the carriage of conditional contraband (except where the enemy has no seaboard) this rule was modified and finally abrogated by most of the belligerent governments in the early months of the war.[2] The doctrine was in effect applied by Sir Samuel Evans in the case of the *Katwyk* [3] decided in May 1915 where he condemned a cargo of conditional contraband shipped on a Dutch vessel and consigned to Rotterdam, although he made no allusion in his opinion to the doctrine. In the case of the *Kim and Other Vessels* Sir Samuel formally applied the doctrine and discussed at great length its history and *raison d'être*. As to this he said:

"Two important doctrines familiar to international law come prominently forward for consideration. The one is embodied in the rule as to 'continuous voyage' or 'continuous transportation'; the other relates to the ultimate hostile destination of conditional and absolute contraband respectively.

[1] See also *supra*, Sec. 412. See also in this connection the British cases of the *Pacific* and *San Francisco* (VII Lloyd 75) and the *Oranje Nassau* (IX, *ibid.*, 189).

[2] See Sec. 388, *supra*.

[3] V Lloyd 248; III Br. & Col. Pr. Cas. 60.

"The doctrine of 'continuous voyage' was first applied by the English Prize Courts to unlawful trading. There is no reported case in our Prize Courts where the doctrine is applied in terms to the carriage of contraband. But it was so applied and extended by the United States Courts against this country in the time of the American Civil War, and its application was acceded to by the British government of the day, and was, moreover, acted upon by the International Commission which sat under the treaty between this country and America, made at Washington on May 8, 1871, when the commission, composed of an Italian, an American, and a British delegate, unanimously disallowed the claims in the *Peterhoff* (5 Wall. 28), which was the leading case upon the subject of continuous transportation in relation to contraband goods. (The other well-known American cases—for example, the *Stephen Hart* (Blatch. Pr. Cas. 387), the *Bermuda* (3 Wall. 514), and the *Springbok* (5 Wall. 1) —considered and applied the doctrine in relation to attempted breaches of the blockade.)

"I am not going through the history of it, but the doctrine was asserted by Lord Salisbury at the time of the South African War with reference to German vessels carrying goods to Delagoa Bay, and as he was dealing with Germany he fortified himself by referring to the view of Bluntschli as the true view, as follows: 'If the ships or goods are sent to the destination of a neutral port, only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified.'

"It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use. Neutral traders, in their own interests, set limits to the exercise of this right as far as they can. These conflicting interests of neutrals and belligerents are the causes of the contests which have taken place upon the subject of contraband and continuous voyage.

"A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the Conference in the case of absolute contraband, and it was expressly declared that 'it is immaterial whether the carriage of the goods is direct, or entails transshipment, or a subsequent transport by land.' As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband, except where the enemy country had no seaboard.

"As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy government or its armed forces? And with the facilities of transportation by sea and by land which now exist the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy

transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached."

He added that he had no hesitation in pronouncing that the doctrine had become a part of the law of nations and was in accord with the views of the great body of modern jurists and also with the practice in recent maritime wars.[1]

In the case of the *Louisiana and Other Vessels*[2] the Judicial Committee approved the view thus expressed by Sir Samuel Evans. Speaking of the abrogation of the doctrine of the Declaration of London so far as it applied to conditional contraband and of the modification of the Declaration by the British Orders in Council, Lord Parker said:

"The Declaration of London was a provisional agreement embodying certain somewhat sweeping changes in international law. Its 35th Article in effect entirely abrogates the doctrine of continuous voyage in the case of conditional contraband. Parliament refused to consent to its ratification, and it never became binding on this country. It was, however, by Order in Council dated August 20, 1914, adopted by His Majesty for the period of the present war with certain modifications and additions. By one of these modifications it was provided that, notwithstanding Article 35, conditional contraband, if shown to be destined for the armed forces or a government department of the enemy State, should be liable to capture to whatever port the vessel was bound, or at whatever port the cargo was to be discharged. This modification, in effect, neutralised Article 35, and the doctrine of continuous voyage remained as applicable to conditional contraband as it had been before the Order.

"The application of the doctrine of continuous voyage to conditional contraband appears to have given rise, during the earlier months of the war, to certain diplomatic representations on the part of the United States. These representations are said to have led to the repeal of the Order of August 20, 1914, and to the substitution therefor of the Order in Council of October 29, 1914. By this last-mentioned Order the Declaration of London was again adopted by His Majesty for the period of the present war, with certain additions and modifications. The material modification, however, now provided that, notwithstanding Article 35 of the Declaration, conditional contraband should be liable to capture on board a vessel bound for a neutral port—firstly, if the goods are consigned "to order," or, secondly, if the ship's papers do not show who is "the consignee of the goods," or, thirdly, if they show "a consignee of the goods" in territory belonging to or occupied by the enemy. The effect of the Order is, therefore, to waive the doctrine of continuous voyage except in those cases expressly referred to in the modification."

[1] See also Sec. 421, *infra*.
[2] V Lloyd 248; III Br. & Col. Pr. Cas. 60. See also Sec. 114, *supra*.

The German prize ordinance, in conformity with Article 35 of the Declaration of London, excluded the application of the doctrine of continuous voyage to the carriage of conditional contraband but in consequence of the British and French modifications the ordinance was amended, by way of reprisal, in April 1915 so as to bring it into conformity with the new Anglo-French rule. Until then the German Prize Courts did not apply the doctrine in the case of conditional contraband, but after that date it was applied whenever the question was raised.[1]

The French Prize Council appears to have had no occasion to apply the doctrine prior to the decree of November 6, 1914, when the rule of the Declaration of London was modified. After that date the doctrine was applied within the limits laid down by the decree. After the decree of July 7, 1916, when the Declaration of London was abrogated in its entirety the doctrine of continuous voyage was applied without question as to the conformity of the doctrine with international law.[2]

The Italian Prize Commission applied the doctrine to conditional contraband after the promulgation of the decree of June 3, 1915, which altered the rule of the Declaration of London in the same sense as did the British and French orders and decrees.[3]

Sec. 420. Circumstances Under Which Applied. The doctrine of continuous voyage was applied in the cases of many cargoes destined to the ports of nearly all the neutral countries of Europe, notably Denmark, Italy, the Netherlands, Greece, Norway, Spain, and Sweden and even to ports of the captor State or its allies. In a number of cases also the doctrine was applied, or its application demanded, to shipments from the ports of one neutral country to those of another or from one neutral port to another port in the same country, as for example between a colonial port of a neutral country and a port in the mother country.[4] It was also applied under a great variety of circumstances and conditions. It happened that there were few or no occasions where it was necessary to distinguish between the continuity of the voyage of the ship and that of the cargo since in

[1] See the case of the *Artemis* No. 1 cited by Verzijl, p. 844. Not found in the *Entscheidungen.*

[2] See among others the cases of the *Nieuw Amsterdam* (Fauchille, *Jurispr. Franc.* 14); the *Eir* (*ibid.*, 32); the *Jiul* (*ibid.*, 26); the *Cotentin* (*ibid.*, 299).

[3] See the case of the *Kyzicos* (Fauchille et Basdevant, *Jurispr. Ital.* 57).

[4] Such were the French cases of the *Insulinde*, the *Boeroe* and the *Karimata* (Fauchille, 21, 53, 62).

apparently all of the cases which came before the Prize Courts it was the ultimate destination of the latter rather than the former which the Courts were called upon to determine.

It is impossible here to discuss all the numerous cases in which the doctrine of continuous voyage was applied by the Prize Courts during the late war. It must suffice therefore to call attention only to the more important circumstances and conditions under which it was applied.

Sec. 421. View of the British Government and Prize Courts. The British Prize Court in the case of the *Kim* discussed at some length the history of the doctrine and the policy of the British government toward it. It also dwelt upon the peculiar conditions of the late war which in its judgment made the application of the doctrine necessary if the sending of contraband to an enemy country circumstanced as Germany was, was to be effectually prevented.[1] The British Secretary of State for Foreign Affairs in a note of February 10, 1915,[2] to the American Ambassador at London, speaking of the changed conditions which justified the application of the doctrine, said:

> "No one in these days will dispute the general proposition that a belligerent is entitled to capture contraband goods on their way to the enemy; that right has now become consecrated by long usage and general acquiescence. Though the right is ancient, the means of exercising it alter and develop with the changes in the methods and machinery of commerce. A century ago the difficulties of land transport rendered it impracticable for the belligerent to obtain supplies of seaborne goods through a neighboring (neutral) country. Consequently the belligerent actions of his opponents neither required nor justified any interference with shipments on their way to a neutral port. This principle was recognised and acted on in the decisions in which Lord Stowell laid down the lines on which captures of such goods should be dealt with.
>
> "The advent of steam power has rendered it as easy for a belligerent to supply himself through the ports of a neutral contiguous country as through his own and has therefore rendered it impossible for his opponent to refrain from interfering with commerce intended for the enemy merely because it is on its way to a neutral port."

Adverting to the policy of the United States government during the Civil War which, he said, was not inconsistent with the "general principles already sanctioned by international law," the Secretary declared that it met with no protest from the British government notwithstanding the losses and inconveniences which British shippers suffered therefrom. Referring to the facilities

[1] See Sec. 419, *supra*.

[2] *Supp.* to 9 *Amer. Jour. of Int. Law*, p. 27.

which the introduction of steamers and railways afforded for the conveyance of contraband through neutral ports to belligerents the Secretary said:

"The opportunities now enjoyed by a belligerent for obtaining supplies through neutral ports are far greater than they were fifty years ago, and the geographical conditions of the present struggle lend additional assistance to the enemy in carrying out such importation. We are faced with the problem of intercepting such supplies when arranged with all the advantages that flow from elaborate organization and unstinted expenditure. If our belligerent rights are to be maintained, it is of the first importance for us to distinguish between what is really *bona fide* trade intended for the neutral country concerned and the trade intended for the enemy country. Every effort is made by organizers of this trade to conceal the true destination, and if the innocent neutral trade is to be distinguished from the enemy trade it is essential that His Majesty's government should be entitled to make, and should make, careful enquiry with regard to the destination of particular shipments of goods even at the risk of some slight delay to the parties interested. If such enquiries were not made, either the exercise of our belligerent rights would have to be abandoned, tending to the prolongation of this war and the increase of the loss and suffering which it is entailing upon the whole world, or else it would be necessary to indulge in indiscriminate captures of neutral goods and their detention throughout all the period of the resulting court proceedings."

In applying the doctrine, the British Prize Court at first laid down certain principles which the Supreme Court of the United States had followed during the Civil War, one of which was that the act of transportation in order to come within the purview of continuous voyage must be effected in execution of a single commercial transaction which the shipper had in view at the commencement of the voyage. Another was that contraband goods consigned to a neutral port could not be regarded as having an ultimate enemy destination if they were intended to be "incorporated in the common stock" of the neutral country, although the enunciation of both principles was accompanied by certain reservations and qualifications the effect of which was to extend materially the doctrine of continuous voyage. In brief, the nature of the transaction and the intention of the shipper must be taken into account in determining the ultimate destination or use of the goods. But very soon, as appears from the judgment in the case of the *Kim*, the Court began to interpret the element of intent in such fashion as to attenuate its effect. Thus it laid down the principle that it was not necessary to establish hostile destination to show that the shipper had at

the commencement of the voyage an intention of sending the goods to enemy country; it was sufficient to show that he formed such intention during the course of the voyage. Similarly, it was not necessary to show that the shipper himself had a premeditated design to send goods to the enemy; it was enough to show that he knew that their destination was hostile. Finally, the Prize Court appears to have abandoned the doctrine of intention and condemned the goods whenever it was shown that the shipper had consigned them to a consignee to whom he had parted with them, without reserving any control over their ultimate disposition and when it was shown that the consignee had the intention of sending them to the enemy.[1]

Sec. 422. Interpretation of the Conception "Common Stock." The Prize Court readily admitted, following the decisions of the United States Supreme Court during the Civil War, that goods consigned to *bona fide* traders in neutral territory and intended to be "imported into the common stock" of the country were not to be considered as having an ultimate hostile destination.[2] But incorporation into the common stock was interpreted to mean "consumption by the people of the country." Therefore leather imported into Sweden to be there used for the manufacture of shoes which were intended for the armed forces of Germany could not be considered as being incorporated in the "common stock."[3] The contention of the claimants was that contraband goods could not be seized by a belligerent if upon a continuous voyage to the enemy, or to the enemy's armed forces, unless they were intended to be carried to an enemy destination in the condition in which they existed at the time of seizure. In rejecting this interpretation Sir Samuel Evans said:

> "One of the tests applied was whether the goods imported were intended to become part of the common stock of the neutral country into which they were first brought. In my view, the notion that leather imported into a neutral country for the express purpose of being at once turned into boots for the enemy's forces becomes incorporated in the common stock of the neutral country is illusory. Instances can be given and multiplied which appear to reduce to an absurdity the argument that if work is done in the neutral country upon goods which are intended ultimately for the enemy, that circumstance of necessity puts an end to their contraband character, and prevents their being confiscable according to the doctrine of continuous voyage."

[1] See the case of the *Norne and Other Vessels* discussed, *supra*. See table later.

[2] See notably the cases of the *Kim*, the *Kronprinzessin Victoria*, and the *Maracas and Other Vessels*, cited above.

[3] The *Balto*, VI Lloyd 151; II Br. & Col. Pr. Cas. 398.

Citing various instances in illustration of the "absurdity" of the argument of the claimants, he asked: "If a field gun was imported, would it be protected from seizure because it would, in fact, be mounted upon its appropriate carriage before being exported from a neutral country to the enemy's front?" and he added: "the Court could not give affirmative answers to such questions as these unless it cut itself adrift from the safe anchor of common sense."

The view here expressed by Sir Samuel Evans was evidently approved by the Judicial Committee in the case of the *Baron Stjernblad*,[1] where it was a question of the ultimate destination of a quantity of cocoa beans consigned to the neutral port of Gothenburg. The goods were released on the ground that the evidence did not establish an ultimate enemy destination, but since there were reasonable grounds of suspicion justifying the seizure, the Court refused to award costs or damages to the claimant. Regarding the question as to incorporation in the common stock, Lord Parker said:

"The position is therefore this. If the shipments of cocoa beans to Sweden be considered collectively, a considerable portion thereof must be destined for or find its way into Germany, either by the re-export to Germany of the beans themselves or by the export to Germany of the various products of the beans. It must be remembered that in the *Balto* (1917), (2 P. Cas., 398; 86 L. J. P. 83; (1917) P. 79) it was decided that an intention to export to an enemy country the manufactured products of imported raw material might bring a case within the doctrine of continuous voyage. The decision is not binding on this Board; but the appellants' counsel did not ask their Lordships to review it, or question its validity in law."

Later in the case of the *Bonna* (1918)[1] the Crown demanded the condemnation of a quantity of cocoanut oil (conditional contraband) consigned to a Swedish port, which the claimants alleged was to be used for the manufacture of margarine for consumption in Sweden, on the ground that a part of the oil would be re-exported to Germany or that the margarine manufactured from it would release for export to Germany a corresponding amount of butter consumed in Sweden. Although Sir Samuel Evans rejected the argument of the Crown and released the goods, he took occasion to make the following observations:

[1] VI Lloyd 99; III Br. & Col. Pr. Cas. 17.
[2] VII Lloyd 367; III Br. & Col. Pr. Cas. 163.

"Before pronouncing the decision of the Court, I think it right to say that, if it were established that raw materials were imported by a neutral for the manufacture of margarine with an intention to supply the enemy with the manufactured article, I should be prepared to hold that the doctrine of continuous voyage applies so as to make such raw materials subject to condemnation as conditional contraband with an enemy destination. I should go even further, and hold that if it were shown that in a neutral country particular manufacturers of margarine were acting in combination with particular vendors or producers of butter, and that the intention and object of their combination was to produce the margarine in order to send the butter to the enemy, the same doctrine would be applicable with the same results.

"But there is a long space between those two supposed cases and the one now before the Court; and this space in my view cannot be spanned by the application of the accepted principles of the law of nations. I do not consider that it would be in accordance with international law to hold that raw materials on their way to citizens of a neutral country to be converted into a manufactured article for consumption in that country were subject to condemnation on the ground that the consequence might, or even would necessarily, be that another article of a like kind and adapted for a like use would be exported by other citizens of the neutral country to the enemy."

In short, Sir Samuel was ready to go to the length of admitting the principle of "substitution" and of applying the doctrine of continuous voyage to the carriage of conditional contraband to be manufactured into articles which released in the neutral country foodstuffs, provided it was shown that the manufacturers were acting in collusion with local exporters with the object and intention of furnishing supplies to the enemy.

Sir Henry Duke, Sir Samuel's successor as President of the Prize Court, approved the judgment of the latter and refused to apply the doctrine of continuous voyage in the case of goods shipped to Amsterdam, which it was alleged would replenish the neutral stock of such goods or release other articles for export to Germany.[1] He said:

"I share the view which I may say with great respect was expressed by my predecessor, Sir Samuel Evans, in the case of the *Bonna*. I think, as Sir Samuel thought, that there is no ground for extending the operation of the right of capture to goods which are introduced into the neutral market for the supply of that market while goods produced in the neutral State are being supplied to an enemy State. I accept the proposition that if the common stock were being formed in a neutral State for the purposes of enemy supply, and contributions were made to that common stock by import from foreign countries, it would be fair ground for condemnation if there was no discrimination in those supplies

[1] *City of Lincoln* and *Demodocus* (not found in the published collections).

as between goods for consumption in the neutral market and goods for the supply of the enemy, but that proposition is not supported as to the present claimants upon the facts of the case."

In the case of the *Norne and Other Vessels*[1] Sir Henry Duke held and the Judicial Committee affirmed his judgment, that the doctrine of continuous voyage was applicable when the shipper did not retain control of the disposal of the goods upon their arrival at the neutral port and the mere fact that the goods would be offered for sale by public auction at the port of arrival was not in itself conclusive of innocent destination. The cargo in this case consisted of oranges (conditional contraband) shipped from Spain on neutral vessels, and consigned to a fruit dealer in Rotterdam. Lord Parmoor for the Judicial Committee thus stated the view of their Lordships:

"The contention of the appellants is that the destination of the voyage was Rotterdam, and that if the voyage had been carried through without interruption, the oranges would, in the ordinary course of business, have been offered to local dealers at public auction, thereby becoming part of the common stock of a neutral country, to whatever consumers they might ultimately be sold. It was said that if this contention is not accepted, and it is held that the anticipation that a large proportion of the oranges might go for consumption in Germany is sufficient to make them contraband, the consequence is that goods within the category of conditional contraband would be liable to seizure and condemnation wherever there was anticipation that they might be largely sold to enemy customers. The answer is that the anticipation of a large sale to enemy customers is not sufficient to make goods liable as articles of contraband, but that there must be anticipation of sale either to an enemy government or an enemy base of supply. For instance, in the present case, there must be anticipation that a large number of oranges sold would find their way to Hamburg, which has already been held in many cases to be an enemy base of supply. Their Lordships are unable to hold that the mere fact that goods will be offered for sale by auction at the port of arrival is in itself conclusive of the innocency of their destination. It would appear to them to be too wide a generalisation that, whatever the special conditions may be, the goods could never be condemned as contraband if once it is established that they would be offered at public auction in a neutral market."

It will be observed that their Lordships emphasized the distinction between anticipated sales to private enemy customers and anticipated sales to an enemy government. It is not clear if the sale of imported fruit at public auction in a neutral port does not have the effect of incorporating it in the common stock, what would constitute such incorporation. It would seem to

[1] IX Lloyd 402, 424; III Br. & Col. Pr. Cas. 977.

result from the decision therefore that nothing but actual local consumption would satisfy the requirement as to incorporation into the common stock.

Sec. 423. The Same. French Interpretation. The French Prize Court at the outset, as has already been stated, applied the doctrine of continuous voyage in the case of conditional contraband goods consigned "to order" to Dutch ports from which, in consequence of the Convention of October 17, 1868, relative to the navigation of the Rhine, the goods could be freely transported on the Rhine to German ports.[1] It likewise applied the doctrine in the case of a consignment from one neutral port to another neutral port, both in the same country (Greece), when it was proved that the goods had been embarked in a clandestine manner by a shipper who had numerous connections with the enemy and that they came from a depot constituted by the enemy and were destined to a person who, financially connected with a company whose director had close relations with the enemy, must be regarded as a suspect.[2] It also applied the doctrine in a case where the goods (in this case absolute contraband) were destined to a port in an allied country (Russia) but which had to be trans-shipped in an enemy port and there delivered to an enemy agent.[3] In numerous cases the doctrine was applied to goods consigned to Switzerland, often to the Swiss *Société de Surveillance Economique*, by way of French or Italian ports whenever it was shown that the consignee was acting as an intermediary for getting contraband into Germany.[4]

Sec. 424. The Same. German Decisions. The German Prize Court applied the doctrine in numerous cases. In the case of the *Mjölner*,[5] involving the question of the ultimate destination of conditional contraband goods shipped on a Swedish vessel from Copenhagen to Stockholm and carrying a collective bill of lading in the name of the shippers or their order, it held that a collective bill of lading did not give rise to the same uncertainty as one made out to order and therefore did not create a legal

[1] See notably the *Insulinde* (Fauchille, *Jurispr. Franc.* 21), the *Boeroe* (*ibid.*, 53) and the *Karimata* (*ibid.*, 62).

[2] The *Epaminondas* (*ibid.*, 477).

[3] The *Cotentin* (*ibid.*, 999). To the same effect see the *Grao* (*ibid.*, 369), where the goods were consigned to Genoa in transit, and were destined to a neutral consignee but the papers did not indicate the ultimate destination and the ship was, moreover, voyaging in irregular conditions.

[4] See among other cases the *Nuevo Ampurdanas* (*ibid* 481), the *Kirkoswald* (*ibid.*, 441), and the *Cordona* and other vessels (*Rev. Gén.*, 1920, *Jurispr.* 100).

[5] II *Entsch.* 421; Fauchille et De Visscher 320.

presumption of hostile destination, as did a consignment to order; that in determining whether proof in rebuttal of presumed hostile destination had been made it was necessary to take into account the fact that the goods were not being shipped in the direction of enemy territory but were destined to a neutral port and also the fact that the goods were such as the civil population were in daily need; that an embargo on the re-exportation of such goods was as a general rule a sufficient guarantee that they would remain in the neutral country, but that this guarantee would not be accepted as conclusive when it was shown that the embargo was not enforced. In this case the bill of lading mentioned that the goods were consigned to "Petrograd via Stockholm" and bore the annotation "in transit," in consequence of which they were held to have had an enemy destination.

In the case of the *Brage*[1] the German Prize Court refused to attribute an ultimate enemy destination to conditional contraband goods consigned from a Danish to a Swedish port with a bill of lading made out "to order" when it was proven that the goods had been sold in Denmark under conditions such that they could only be consumed in Sweden and that under no hypothesis could they be re-exported, given the Swedish embargo which was strictly enforced. But later in the case of the *Norden*,[2] where it was a question of the ultimate destination of a cargo mainly of linseed oil shipped from Rotterdam to Norwegian ports and consigned to order, the Supreme Court held that proof in rebuttal of presumed hostile destination was not sufficient if limited merely to establishing that the goods would be subjected to the process of working over in the neutral country. It must be shown in addition that the articles manufactured therefrom would not be useful for the enemy. Finally, it added that the mere proclamation of an embargo upon the exportation of such goods was not in itself sufficient to rebut the presumption of ultimate enemy destination. In these respects the view of the German Prize Court was essentially the same as that of the British Prize Court.[3]

As has already been pointed out above, the German Supreme Prize Court in the case of the *Marietta di Giorgio*[4] condemned a cargo of conditional contraband (salt) laden on a Norwegian

[1] I *Entsch.* 267; Fauchille et De Visscher, *Jurispr. All.* 175.
[2] II *Entsch.* 35.
[3] To a similar effect see the cases of the *Pomona* (II *Entsch.* 147), the *Balto* (*ibid.*, 66) and the *Atlas* (*ibid.*, 321).
[4] II, *ibid.*, 156. See Sec. 411, *supra.*

vessel bound from a Spanish port to a Norwegian port, but which was to touch during the course of the voyage at an English port for inspection and for replenishing its bunkers with coal. The condemnation was based on the possibility that in view of the scarcity of the supply of salt in England the English authorities might requisition it upon arrival at the English port. In these circumstances there was a presumption of enemy destination and the burden of proving the contrary had not been discharged by the claimants. Subsequently, however, in two cases, one where a Norwegian vessel carrying contraband to a Norwegian port was to touch at an English port to engage a tug and the other where a Swedish vessel was to call at the Portuguese port of Lisbon *en route* to Sweden, the Prize Court did not base its decision on these facts.[1] In the case of the *Oostzee*[2] the Prize Court applied the doctrine of continuous voyage or ultimate destination in the case of a cargo of contraband laden on a Dutch vessel which had been seized by the British naval authorities while on a voyage from America to Holland and released upon an undertaking by the shippers that upon reaching the Dutch destination they would bring the contraband goods back to England and place them in the custody of the Prize Court for adjudication. During the return voyage from Holland to England the vessel was captured by the Germans. The German Prize Court held that enemy destination must be presumed in such a case and that under the circumstances mentioned it was superfluous to speculate as to what would have been the decision of the English Prize Court. And it was immaterial that the captain had in consequence of bad weather and the danger of mines temporarily abandoned the return voyage to England since he was under an engagement to take the goods back to England and would be obliged to do so with the return of more favorable conditions.[3]

[1] The *Falls of Afton* (II *Entsch.* 250); and the *Victoria* (*ibid.*, 281).
[2] I *Entsch.* 347; Fauchille et De Visscher 261.
[3] Among other cases involving the application of the doctrine of ultimate destination see the *Norden* (II *Entsch.* 35), the *Gamma* (*ibid.*, 185), the *Gelderland* (*ibid.*, 211) and the *Johanna* (*ibid.*, 302).

CHAPTER XIV

CONTRABAND OF WAR (CONTINUED). RIGHT AND DUTY OF SEARCH. UNNEUTRAL SERVICE

I

Liability of Contraband Carrying Ship to Condemnation

Sec. 425. Provisions of Article 40 of Declaration of London. According to Article 40 of the Declaration of London a vessel carrying contraband may be condemned if the contraband reckoned either by value, weight, volume or freight, forms more than half the cargo. This rule which, it was alleged constituted a modification of the old practice, was incorporated in the prize regulations of most of the belligerent powers upon the outbreak of the world war and it was retained by Great Britain, France and Russia even after they had abrogated the Declaration of London. As to the *raison d'être* and equity of the rule under which a contraband-carrying vessel should be liable to condemnation equally with the contraband goods themselves Sir Samuel Evans made the following observations:

"If a belligerent has a right by means of capture and subsequent condemnation to prevent contraband goods from reaching the enemy, and to have them confiscated, it would appear to be not unfair or unreasonable that the belligerent should also have rights of a like kind against the vessel in which the goods were being carried. The goods could not reach the enemy without the help of the vessel. The transaction in the ordinary course involves the conjoint operation of the owner of the goods and the owner of the vessel. The one trader is selling his goods for profit: the other trader is letting his vessel on hire for profit to transport them. Why should one of these two classes of traders in case of capture lose his property and the other have it preserved?" [1]

Sec. 426. Case of the "Hakan." The old practice and the effect of the new rule were the subject of extended discussion by counsel, by the Prize Court and by the Judicial Committee in the case of the *Hakan*,[1] a Swedish owned vessel seized by the

[1] The *Hakan* (see Sec. 426, *infra*).
[2] V Lloyd 161, 186; II Br. & Col. Pr. Cas. 210, 479.

British naval forces while carrying a cargo, the whole of which consisted of conditional contraband, to Lübeck, a German base of supply. At the time of seizure the ship was chartered by the owners to a Swedish firm for a period of six weeks to be employed in the carrying trade between Norwegian, Swedish and German ports on the Baltic. The Crown based its argument for condemnation on the ground that by international law a ship carrying contraband was liable to confiscation. This rule, it was contended, was well established in England and had been generally recognized by European countries although they had adopted varying rules as to the proportion of contraband cargo which they would permit to be carried without its entailing condemnation of the ship. The Crown also relied upon Article 40 of the Declaration of London as evidence of the consensus of opinion among the principal maritime powers as to the proportion of contraband cargo, which apart from aggravating circumstances, might be carried without rendering the ship liable to condemnation. This Article, it was further argued, in so far as it was not in accord with the generally accepted rule, was a mitigation or attenuation of the severity of the old rule and consequently the Order in Council adopting the rule of Article 40 of the Declaration was valid and binding on the Prize Court.

The claimants, on the other hand, contended that according to a well-established rule of international law a neutral vessel carrying contraband was not liable to condemnation unless the contraband was the property of the shipowner or unless he was guilty of fraud by endeavoring to defeat the legitimate rights of the captor. Article 40 of the Declaration of London was contrary to that rule and having regard to the decision of the Privy Council in the *Zamora* case, the Order in Council adopting Article 40 was not binding on the Court. The Declaration of London never having been ratified by any of the powers, was not an internationally binding agreement and was not a part of the law of nations.

Addressing himself to the question as to whether there was at the time a well-established rule of the law of nations which excepted a contraband-carrying neutral vessel from confiscation, Sir Samuel Evans stated that according to the ancient practice of Great Britain, prior to the Napoleonic wars, apart from special treaties, such vessels were liable to condemnation equally with the goods. Sir William Scott had held that such a rule was

"perfectly defensible on every principle of justice," [1] although at the time a relaxation of the old practice had been introduced, except in certain cases of an aggravating character. He then reviewed at length the practice of other nations as it was shown by their prize regulations and prize decisions, down to the meeting of the International Naval Conference at London in 1908-9 and gave a summary of the views of the governments there represented, as they were embodied in the memoranda submitted by them to the Conference. Then adverting to the conclusion of the Conference as it was embodied in Article 40, he stated that the Article had been adopted by Great Britain and her allies, France, Russia, Italy, and Japan; and that it had been equally incorporated in the German prize code and in the Austrian naval regulations. There were, he said, two or three points of view from which the question should be considered; (1) apart from any resolutions or the Declaration of London, what was the rule of international law applicable in the case? (2) was the Order in Council adopting the rule of Article 40 so contrary to the said rule of international law that it was invalid or was it merely a mitigation of the captor's rights in favor of a neutral or an enemy and therefore valid in accordance with the decision in the *Zamora* case? or (3) did the action of the powers at the London Conference and their subsequent action and practice bring into existence by a sufficiently general consensus of view and assent a new rule of international law to which Prize Courts ought to give effect, apart from any Order in Council?

Regarding the first question Sir Samuel said:

"As to the first, having regard to the decrees and practices of nations for the past hundred years, I should feel bound to declare that the old rule which prevailed before the relaxation introduced a century or two ago should be regarded as valid at the present day. This means that the so-called well-established rule in favour of a contraband laden ship contended for by the claimant does not exist. In the days of the relaxation referred to the ship was subject to confiscation in many respects, which were sometimes called exceptions. It has always been held that if any part of the contraband carried belonged to the owner of the ship the ship itself was subject to the penalty of confiscation, as was the contraband. According to our most recent writers, the vessel suffered if her owner was privy to the carriage of the contraband goods, whether they belonged to him or not—see *Westlake's International Law,* Pt. II, 291, and *Hall's International Law,* Pt. IV, 666."

Then adverting to the presumption of knowledge on the part of the owner, either directly or through the master, that the ship

[1] The *Neutralitet,* 3 C. Rob. 295; I Eng. P. C. 309.

in this case was intended to engage in contraband trade between Scandinavian and German ports, he said there could in view of the special facts be no doubt of such knowledge. Apart therefore from the Order in Council adopting the half-cargo rule of Article 40 the vessel must be condemned. As to the other two questions he concluded:

"Secondly, it follows from what I have stated, that the provisions of Article 40 were a limitation or mitigation of some of the rights of the Crown; and the result of the decision in the *Zamora* is that accordingly the provisions of the Order are valid.

"Thirdly, although there is no formal instrument binding as an international convention, I think that the attitude and action of most important maritime States before and since 1908 have been such as to justify the Court in accepting as forming part of the law of nations at the present day a rule that neutral vessels carrying contraband which by value, weight, volume or freight value forms more than half the cargo are subject to confiscation and to condemnation as good and lawful prizes of war."

Upon appeal, the reasoning and the judgment of Sir Samuel Evans were affirmed by the Judicial Committee. The decision was based mainly on the existence of knowledge on the part of the shipowners that the vessel was to be employed in carrying contraband to Germany. Nevertheless their Lordships added:

"Even on the hypothesis that something beyond mere knowledge of the character of the cargo is required, something which may be called 'malignant or aggravating' within the principles of the *Ringende Jacob* (1 C. Rob. 89; i Eng. P. C. 60) or the *Bermuda* (3 Wall. (Amer.) 514), that something clearly exists in the present case. A shipowner who lets his ship on time charter to an enemy dealer in conditional contraband for purposes of his trade at a time when the conditional contraband is vitally necessary to, and has been requisitioned by, the enemy government for the purpose of the war is, in their Lordships' opinion, deliberately 'taking hostile part against the country of the captors' and 'mixing in the war' within the meaning of those expressions as used by Chief Justice Chase in the *Bermuda* (3 Wall. (Amer.) 514, 555, 556)."

Sec. 427. The Element of Knowledge on the Part of the Shipowner. Knowledge of the Character of the Goods Sufficient to Justify Condemnation. That knowledge on the part of the shipowner that his vessel is to be employed in carrying contraband to the enemy renders the ship liable to condemnation equally with the cargo, is an ancient rule of prize law. It is also a rule that such knowledge is presumed, but may be rebutted by proof to the contrary. But the existence of knowledge, at least in the opinion of Sir Samuel Evans, was not essential to

condemnation. In the case of the *Hakan* Sir Samuel stated that "if a shipowner allows his vessel to be chartered or used in such a way that contraband goods may be laden upon it for transport to an enemy, whether he be aware of the use to which his vessel is put or not, it does not appear to be inequitable that he should suffer from the results of such a use of his vessel as would enure to the enemy's benefit." He also expressed the opinion that if a shipowner had knowledge of the contraband character of the cargo it must be presumed that in allowing it to be shipped on his vessel he had an "intent" to help the enemy.

Lord Parker, speaking for the Judicial Committee in the same case (upon appeal), discussed at length the element of knowledge. Adverting to the decision of Lord Stowell in the case of the *Neutralitet* where his Lordship gave as the reason for the modern relaxation from the ancient rule relative to the condemnation of the ship, the possibility that contraband goods might be carried without the personal knowledge of the owner of the ship (which, however, was found not to be the fact in this case), Lord Parker said:

"The reasoning is sound; for if the ancient rule was modified because of the possible want of knowledge on the part of the shipowner, it is perfectly logical to treat actual knowledge on the part of the shipowner as a good ground for excepting any particular case from the modern rule. Knowledge will also explain the two main exceptions to which Lord Stowell refers. If the shipowner also owns the contraband cargo, he must have this knowledge, and if he sails under a false destination or with false papers, it is quite legitimate to infer this knowledge from his conduct. In his earlier decision in the *Ringende Jacob* (1798) (1 C. Rob. 89; i Eng. P. C. 60) Lord Stowell had stated the modern rule to be that the carrying of contraband is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. If by malignant and aggravating circumstances Lord Stowell meant only circumstances from which knowledge of the character of the cargo might properly be inferred, the rule thus stated does not differ from that laid down in the subsequent case of the *Neutralitet* (3 C. Rob. 295; 1 Eng. P. C. 309). But the words used have by some writers been taken as indicating that, in Lord Stowell's opinion, besides knowledge of the character of the cargo there must be on the part of the shipowner some intention or conduct to which the epithets 'malignant or aggravating' can be applied in a real as opposed to a rhetorical sense. Any such hypothesis seems, however, to vitiate the reasoning of Lord Stowell in the *Neutralitet*. Sailing under a false destination or false papers may possibly be called malignant or aggravating. There is not only the knowledge of guilt, but an attempt to evade its consequences. But in

the case of the shipowner who also owns the contraband on board his ship it is difficult to see where the malignancy or aggravation lies if it be not in the knowledge of the character of the goods on board. If it be malignant or aggravating on the part of the owner of the goods to consign them to the enemy, it must be equally malignant and aggravating on the part of the shipowner knowingly to aid in the transaction."

Referring to the apparent divergence among the Prize Courts and jurists of other countries than Great Britain and the United States, Lord Parker said:

"If, however, the true principle be that knowledge of the character of the cargo is a sufficient ground for depriving a shipowner of the benefit of the modern rule, this divergence is more apparent than real. It reduces itself to a difference of opinion as to the circumstances under which the knowledge may be inferred; and if it be remembered that knowledge on the part of the shipowner of the character of the cargo must be largely a matter of inference from a great variety of circumstances, such difference of opinion is readily intelligible.

"Referring, for example, to the view entertained in Holland, their Lordships find that although the ship is *prima facie* confiscable if an important part of the cargo be contraband, proof that the master or the charterers could not have known the real nature of the cargo will secure the ship's release. In other words, the proportion of the contraband to the whole cargo raises a presumption of knowledge which may be rebutted. Again, according to the views held in Italy, the ship carrying contraband is liable to confiscation only where the owner was aware that his vessel was intended to be used for the carrying of contraband. Here knowledge is made the determining factor, the manner in which knowledge is to be proved or inferred being left to the general law. Again, according to the views entertained in Germany, a ship carrying contraband can only be confiscated if the owner or the charterer of the whole ship or the master know, or ought to have known, that there was contraband on board, and if that contraband formed more than a quarter of the cargo. Here also knowledge is made the determining factor, although there is a concession to the neutral if the proportion of the contraband to the whole cargo be sufficiently small. Once more, in France the test of the right to confiscate is whether or not the contraband is three-fourths in value of the whole cargo. This view may be looked on as defining the circumstances in which an irrebuttable inference of knowledge arises. The views entertained in Russia and Japan are similarly explicable. In their Lordships' opinion, the principle underlying all these views is the same. There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo; but in some cases the inference as to knowledge arising from the extent to which the cargo is contraband cannot be rebutted, while in others it can, and in some cases, even where there is the requisite knowledge, the contraband must bear a minimum proportion to the whole cargo.

"It follows that the views entertained by foreign nations point to knowledge of the character of the goods being alone sufficient for con-

demnation of a vessel for carrying contraband; in other words, they support the principle to be derived from the reasoning in the *Neutralitet* rather than the principle which has been deduced from the *dictum* in the *Ringende Jacob* and developed in the *Bermuda* (3 Wall. (Amer.) 514). It should be observed that both Westlake and Hall agree that knowledge is alone sufficient to justify condemnation—see *Westlake's International Law,* Pt. II.; *War* (2d ed.), p. 291, and *Hall's International Law* (6th ed.), p. 666.

"Their Lordships consider that in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship, at any rate, where the goods in question constitute a substantial part of the whole cargo."

In the case of the *Ranveig* [1] the Privy Council, affirming the judgment of Sir Henry Duke, held that knowledge on the part of shipowners that their vessels were being employed in the contraband trade entailed condemnation even though they had acted in good faith under a mistake as to the effect of an international agreement. On this point Lord Sumner said:

"Their Lordships think that those who know all the material facts, as these shipowners did, and rely on the reading of a written instrument, which proves to be wrong, do so at their peril. They can no more rely on such an error than upon ignorance of the law. If they read it aright, they were in the right; not having done so, they are in the wrong. They carried a complete cargo of conditional contraband bound to an enemy base of supplies with their eyes open, and the usual consequences follow."

Sec. 428. Deliberate Abstention on Part of Owner from Acquiring Knowledge Constitutes Ground for Condemnation. In the case of the *Zamora No. 2* [2] Lord Sterndale extended the doctrine as to the knowledge of the owner to embrace knowledge which he might have had but which he had deliberately abstained from acquiring. His Lordship held that the fact that the whole cargo in this case was contraband raised a presumption of knowledge on the part of the shipowners of the nature of the venture and that if they did not know that it was a contraband transaction it was because they did not want to know. The presumption not having been rebutted the ship was condemned. The judgment was affirmed by the Judicial Committee. Lord Sumner in his judgment for the Committee said:

"No more striking instance has occurred of a contraband transaction which all but succeeded and none which proves more conclusively what patience and tenacity are needed in probing to the bottom an apparently

[1] IX Lloyd 393; III Br. & Col. Pr. Cas. 1013.
[2] VIII, *ibid.*, 347, 367; III, *ibid.*, 919.

straightforward case, or how liberal and even indulgent a Court of Prize must be in granting the time required to exhaust all the means at the captor's disposal for discovering the truth."

Referring to the contention of the claimants Lord Sumner added:

"The case made was that, even where the whole cargo consists of contraband, nothing less than actual knowledge of its character by the carrier will forfeit the ship. It was not denied that circumstances may raise a presumption of knowledge, such that the carrier must rebut it or fail. It was not contended that a person, who had knowledge of facts sufficient to point the mind of a reasonable man to the truth, could escape by wilfully shutting his eyes to fuller information, but the presumption of knowledge was said to be one only of fact and not of law, each case therefore depending on its own circumstances, so that, if cargo is bound to a neutral port and consists of unwarlike commodities in substantial demand and common use there, only proof and not presumption of knowledge of its ulterior destination will condemn the ship. If the President held that a decree condemning the entire cargo would in itself warrant a decree condemning the ship also, he was wrong in spite of the judgment of Sir Samuel Evans in the *Hakan* and the *Maracaibo*. The true proposition was one quoted from the judgment of this Board in the *Hakan:* 'There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo.'"

Adverting to the varying circumstances which may affect the conclusion he continued:

"It does not follow that every case stands by itself and is independent of authority, nor need captors to make out the knowledge of the shipowner as prosecutors have to bring home a charge to a person accused in an English criminal court. In any case, there is no immunity to a shipowner because he charters his vessel and does not concern himself with the cargo. Indeed, in one respect at least this case requires a sharper degree of scrutiny, for such a course is very easily made a screen for the schemes of others, and very easily becomes deliberate blindness."

As to what constitutes knowledge he said:

"It is clearly settled that a shipowner, who carries an entire cargo of contraband knowingly, forfeits his ship in prize. What constitutes knowledge and what suffices as evidence of it may be matters of difficulty. During part of the eighteenth century the rigorous doctrine still prevailed that any carriage of contraband involved, as a penalty, the confiscation of the carrying ship. By the end of that time, Sir William Scott records, in the *Ringende Jacob* and in the *Neutralitet* that the practice of the Great Powers had greatly relaxed that rule. In the *Hakan* and the *Maracaibo* Sir Samuel Evans did not enquire whether the carrier knew the contraband character of the cargo. He took it that the ancient rule was suspended only, and was still in existence and capable of being

revived, so that, except in so far as the Crown had waived its rights by adopting Article 40 of the Declaration of London, the old rule must still be enforced. The objection to this is that Sir William Scott records a change founded on the agreement of nations, one of the most important sources of international law. After over a century of recognition, can it be said that the relaxation is a mere revocable waiver, which a single Sovereign can withdraw? Lord Parker, in the pronouncement of their Lordships' judgment on appeal in the *Hakan*, pointed out that the common element, which unites the varying practices of different countries, is knowledge on the carriers' part of the character of the cargo carried, and that a presumption of knowledge, sometimes rebuttable and sometimes not, is the feature which makes relevant the proportion of the contraband to the whole. Some countries attach to certain proportions a presumption of knowledge in all cases, irrespective of the extent to which the mind of the particular carrier or shipowner may consciously have been privy to the carriage of contraband. The English Prize Courts, at any rate, have long held that if a shipowner knowingly carries a cargo, which is, in whole or in large part, contraband, he is liable to forfeit his ship. It accordingly becomes necessary to examine the facts of this case somewhat at length, for if they warrant the inference that they were carrying contraband the decree of condemnation should be affirmed without further inquiry."

Referring to Lord Sterndale's conclusion that if the owner did not know that this was a contraband transaction, it was because he did not want to know, Lord Sumner observed:

"Their Lordships have been invited to read this as saying that Mr. Banck [the owner] is not proved to have known the contraband character of the adventure; that if he did not know, because he did not want to know, he was within his rights and owed no duty to the belligerents to inform himself; and that the *Zamora* is condemned contrary to the passage above from the *Hakan* upon a legal presumption arising solely and arbitrarily from the fact that the whole cargo was contraband. It may be that, in his anxiety not to state more than he found against Mr. Banck, the learned President appeared to state something less, but there are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject, or anything at all, is then a wilful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise; but there he is wrong, for he has been put upon notice, and his further ignorance, even though actual and complete, is a mere affectation and disguise. It is in the latter sense that their Lordships take the President's words. So far from finding that Mr. Banck was devoid of knowledge of the contraband character of the adventure, he thought, and they agree, that Mr. Banck understood it very well, so well that he knew where to draw the judicious line between scanty, but sufficient information and undeniable complicity.

Knowledge being proved, no opinion need be expressed as to the effect of presumption in the present case. The evidence fully bears out the conclusion that the transaction was in its inception ambiguous; that any doubts about it were resolved in favour of an illegitimate complexion, so far as Mr. Banck was concerned, by his incuriosity, his reticence and his detachment. So far from showing that he was truly ignorant, he has only involved his company, the claimants, in the consequences which follow from the hazardous possession of sufficient knowledge to condemn them."[1]

Sec. 429. Knowledge on Part of Charterer Does Not Affect Shipowner with Such Knowledge. Sir Samuel Evans in the case of the *Hakan* had used language which seemed to imply that a contraband carrying ship was liable to confiscation not only when the owner or the master had knowledge of the purpose for which she was to be employed but also when the charterer had such knowledge. The material part of the passage was: "it would be placing premiums upon contraband trading to allow the owners to protect themselves by relying on charter parties and sheltering themselves behind a screen of ignorance of their own deliberate construction." In the case of the *Ran*[2] Lord Sterndale was called upon to decide whether this "dictum" as he interpreted it to be, applied in the case of a vessel owned by a Norwegian and chartered to an American firm for a single voyage from New York to Scandinavian ports and which was laden with a cargo which included aluminum and a small quantity of rubber, the latter being described in the manifest and bill of lading as "gum." The Crown based its argument for the condemnation of the ship on the above mentioned dictum of Sir Samuel Evans, it being admitted that the charterers had knowledge of the nature of the cargo and the misdescription of the rubber. Their knowledge, it was argued, should be held to have affected the owner so as to make the vessel liable to condemnation, otherwise the right of the Crown would be defeated by the claim of the shipowner that he had no personal knowledge of the fraud, that he had chartered the vessel to some one else and that he had taken all reasonable precautions against the ship's being employed in contraband trade. Counsel for the owners contended that false description of the cargo was not in itself sufficient to justify the condemnation of the ship but was merely

[1] See also the query raised by Sir Samuel Evans in the case of the *Maracaibo* (below Sec. 431) as to whether a trader was to be allowed to defeat the rights of a belligerent by "Taking care not to know by a species of 'voluntary ignorance'" on the part of shipowners and masters.

[2] IX Lloyd 90; III Br. & Col. Pr. Cas. 621.

evidence from which the Court could infer knowledge on the part of the shipowner if other facts supported it and that international law did not impose on the shipowner liability for the acts of the charterer. Knowledge on the part of the master might be assumed to have a different effect because unlike the charterer he was the owner's agent, but in this case the master had satisfied himself that the goods had a neutral destination. Lord Sterndale rejected the argument of the Crown and held that even if the charterers knew that the rubber was misdescribed for the purpose of being sent to Germany, in the absence of proof as to such knowledge on the part of the shipowner or the master, the shipowner was not affected with the knowledge of the charterers.

"There was," he said, "no case that has been cited to me in which the knowledge of the charterer that some portion of the cargo is contraband intended for an enemy destination has been held sufficient to condemn the ship as against the owner, and to be equivalent to the owner's own knowledge. It is to be remembered that knowledge of the misdescription is not of itself enough; there must be a knowledge of the misdescription under such circumstances as to lead to the inference that the person who knew of the misdescription also knew of the contraband character and contraband destination of the goods. I can find no case in which such knowledge on the part of a charterer, even if it existed, has been held sufficient to justify the condemnation of the ship."

Referring to the dictum of Sir Samuel in the *Hakan* quoted above, Lord Sterndale said:

"Now, the *Hakan* was a small vessel—not ocean going—she was chartered for the purpose of traffic in the Baltic, and was carrying contraband articles to Lübeck, and it was to that circumstance that the learned President was alluding when he said 'in waters favourable to contraband trading.' I do not think, however, that the principle he laid down is confined to those facts, and I think that he meant to say that if the result of the charter is to take the disposal of the vessel out of the hands of the owner and leave the charterer to do what he likes with her, then the owner cannot escape the consequence of what the charterer does, because he has chosen to give the control over to the charterer. I do not think that the learned President had under his consideration a charter of this description. It is to be noted that he said 'enter into time-charter contracts,' and I think that what was in his mind was a charter by which the owner really left it in the hands of the charterer to do what he liked with the vessel so long as he paid his hire. That does not seem to be applicable to a charter of the description I have before me here. As I have pointed out, this is a charter for one trip to neutral ports. It is quite true that they are ports that are not very far from the enemy country, but it is to ports in the country, or in the adjoining country to which the vessel belonged. It is a charter for one trans-Atlantic trip

of a Norwegian vessel to Scandinavian ports, and I do not think that that constitutes such a handing over and divestment of responsibility on the part of the owner as was under the contemplation of the late President in the passage which I have read."

In the judgment of the Privy Council Lord Parker had not referred to Sir Samuel Evans' dictum, although he stated that "there can be no confiscation without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo." Adverting to that statement, Lord Sterndale said:

"I do not think that that was meant to affect the owner with the knowledge of the charterer, even if it existed, in the case of a charter of this description. No doubt, every charter puts the ship into the control of the charterer to a certain extent, but if an owner charters his ship for one specific voyage from neutral port to neutral port, and the objects of the charter can be perfectly well carried out, and in fact were so far as the vast majority of the cargo was concerned carried out in a trade which is perfectly legitimate from any point of view, he cannot be condemned to the loss of his whole ship because the charterer on a voyage of that kind, against the owner's wish and without the owner's knowledge, consigns some minute portion of that cargo to an enemy country."

Sec. 430. Knowledge of Master and Charterer. In the case of the *Kim and Other Vessels No. 2*[1] the Crown asked for the condemnation of three neutral vessels which had been chartered before the war for extended periods to an American shipping corporation and which were seized during the war but released on bail. Subsequently the greater part of their cargoes having been condemned as contraband, the Crown claimed the condemnation of the vessels on the ground that the knowledge of the charterers as to the nature of the cargo and, alternately, that of the masters, was equivalent to that of the shipowners. It was also argued that there was evidence of actual knowledge on the part of the owners and that as to one of the vessels (the *Kim*) a portion of its cargo consisted of rubber falsely described in the ship's papers. As in the case of the *Ran* the claimants contended that proof of actual knowledge on the part of the shipowners was essential to condemnation, knowledge of the charterers not being sufficient. They also referred to the decision of Lord Sterndale in the case of the *Ran* declining to condemn a vessel chartered for a single voyage although it was carrying a small quantity of rubber falsely labelled as "gum." Sir Henry Duke, before whom the case was tried, said that the goods in

[1] X Lloyd 10; III Br. & Col. Pr. Cas. 685.

question came within the rule as to half-contraband cargoes, which Sir Samuel Evans had held in the *Hakan* to be unquestionable. Nevertheless, he preferred in the present case to deal with the question which was the chief subject of argument, namely, the degree and nature of the "knowledge" which renders a ship liable for the carriage of contraband. In the case of the *Hakan* it had been held to be knowledge on the part of the "shipowners" which was essential to justify condemnation, although that judgment did not of itself supply a conclusive test for application in the present case. Sir Henry continued:

"Since the decision in the *Hakan,* the cases of the *Dirigio* and the *Ran* have been argued and determined in this Court. Each of them has a direct bearing on the problem now under consideration. The *Dirigio* was a case of a whole cargo of contraband, and condemnation was claimed on that ground, apart from the facts which showed knowledge on the part of the owners. Lord Sterndale, however, thought it well not to act on that contention, but to examine whether there was such knowledge, taking in this respect the same course as he had taken in a previous case of the *Zamora.* Upon a finding of knowledge on the part of the owner, the *Dirigio* was condemned."

Referring to Lord Sterndale's judgment in the case of the *Ran* from which he quoted at some length, Sir Henry observed that:

"Lord Sterndale distinguished the case of the *Ran* from that of the *Hakan* and pointed out that the *Hakan* was chartered for the purpose of trade in the Baltic, including German ports, in which she was engaged at the time of seizure, whereas the *Ran* was chartered for a specific voyage from neutral port to neutral port, was engaged in trade apparently neutral at the time of seizure, and was only brought in question because the charterer 'against the owner's wish' included in the lading of the vessel some minute portion of cargo destined for an enemy country.

"So far as the present case is concerned, Sir Samuel Evans' judgment in the *Hakan* supports the claim of the Crown against the three ships claimed for condemnation, and its force is not weakened by the words of explanation used by Lord Sterndale in the *Ran.* The judgment is relied upon by the Crown in support of a proposition that the time charter-parties made by the owners of the *Kim,* the *Björnstjerne Björnson,* and the *Alfred Nobel,* with the Gans Shipping Co., put it in the power of the charterers to make the use which they, in fact, made of the three ships, and that when the charterers made a hostile use of the ships which the power granted to them by the owners enabled them to make, the owners became involved with the charterers in the consequences which that use of the ship entails."

After some observations as to what constitutes knowledge and who must possess it to justify condemnation, Sir Henry concluded:

"In each of the present cases the master knew all the material facts at all material times, and was actively concerned in his own ship's part in an enterprise which was calculated and designed to give vital assistance to the enemy. The charterers organised and conducted the enterprise. The owners of the *Kim* and *Björnstjerne Björnson* are proved to have had knowledge of the voyage. The owners of the *Alfred Nobel* do not disclaim like knowledge. I do not proceed, however, upon distinctions applicable to one or other of the vessels, and I do not apply a separate rule in the case of the *Kim* because of the shipment of rubber under a false description. The broad facts as to the whole undertaking, the knowledge of the master, and the knowledge of the charterers seem to me to make a clear case for condemnation with regard to each vessel."

Sec. 431. Proof of Knowledge on Part of Owner Not Necessary Under Article 40 of Declaration of London. In the case of the *Lorenzo* [1] the Prize Court of St. Lucia was called upon in October 1914 to deal with a vessel owned by an American company but which had been chartered by the Hamburg-American Line, ostensibly for a voyage from New York to Buenos Aires with a cargo of coal and provisions and which was captured while proceeding to a rendezvous for the purpose of coaling the German steamer *Karlsruhe*. The owners claimed her release on the ground that they neither knew nor suspected that she was to be employed in carrying contraband, or in any unneutral service. The question, said the Court, was, "Does the absence of complicity on the part of the owners affect in any way the liability of the ship?" Condemnation of the ship, it pointed out, was governed by Article 40 of the Declaration of London which the British government had put into effect. Referring to the proceedings of the International Naval Conference and the official commentary on Article 40 the Court concluded:

"The problem at the outset was, whether the liability of a ship to condemnation for carriage of contraband should be determined—first, by the proportion of contraband to the whole cargo; secondly, by the guilty knowledge, actual or presumed, of owner, master, or charterer; or thirdly, by some combination of both these elements. In the committee's report at page 311, it is stated that practical consideration had brought them to the conclusion that the notion of complicity would afford no safe criterion, and that they were therefore forced to rely solely on the relative proportion of contraband to the whole cargo. It follows, therefore, that article 40 works automatically. Whenever more than half the cargo carried on a neutral vessel is contraband, the vessel becomes the lawful prize of the captors. This result, at any rate, enables neutral shipowners to know precisely how they stand; the wise among them will get an

[1] I Br. & Col. Pr. Cas. 226.

adequate indemnity from their freighters or charterers, so that if their ship is used for unneutral purposes they will be in the same secure position as are the owners of the *Lorenzo* today.

"There is, therefore, no necessity for me to decide what precise degree of credit attaches to the owner's affidavit, or to consider whether the service rendered, or sought to be rendered, amounted to a graver infraction of neutrality than mere carriage of contraband. It is enough, for the purposes of this claim, that the whole cargo of the *Lorenzo* was contraband, in that it consisted of coal and provisions destined for the armed forces of the enemy.

"The vessel must be condemned."

Sir Samuel Evans reached the same conclusion two years later in the case of the *Maracaibo,*[1] a Danish ship carrying a full cargo of conditional contraband to Amsterdam and which was held to have had an ultimate enemy destination. The Crown claimed condemnation of the ship for two reasons, one of which was that her owners knew that she was laden with contraband destined ultimately to Hamburg for the enemy. The whole cargo consisting of contraband, the case was governed by Article 40 of the Declaration of London, and therefore the element of knowledge or intent did not enter into the question. As to this Sir Samuel said:

"I think that in the present state of the law, as agreed and understood between nations, the element of knowledge of the owners or master of the vessel has been eliminated altogether, where such a proportion of contraband is being carried as forms half the cargo in weight, bulk, value, or freight."

The rule laid down by Article 40 and which the Court had followed in the case of the *Hakan,* of making

"the quantitative or qualitative extent of the contraband the test instead of knowledge avoids the necessity of the Courts embarking upon the very difficult and often unsatisfactory enquiry into the state of mind or extent of information of the persons concerned. From experience in this Court I can testify to the difficulty. The tribunal might often feel a certainty that knowledge existed, which would satisfy any conscientious person, without being able, perhaps, to set out step by step sufficient or precise proof of it. Experience also shews not only the ingenuity and multitudinous characters of the devices and shams resorted to in carrying on contraband trading, but how often it is only by the interception of letters, or cables or wireless messages, that the deceptions can be detected and disclosed. And even if there is not, in truth, any actual knowledge, is the trader to defeat belligerent rights by taking care not to know by a species of 'voluntary ignorance'? I hazard the opinion that not many of the shipowners or masters of ships belonging to the Scandinavian

[1] V Lloyd 398; II Br. & Col. Pr. Cas. 294.

or Dutch countries are suffering from any want of knowledge of how articles of a contraband character are sent to Germany, either by water or by land, from neutral ports, which could not reach Germany by direct voyages to her own ports. Knowledge of the destination of such articles in particular cases may be difficult to establish by actual and direct proof.

"If the rule of law is now as I have stated it, Prize Courts will be able to do substantial justice, and to act in accordance with the law, without any apprehension in the mind of any one that their conclusions are founded on suspicions rather than on facts established by strict proof."

Sec. 432. Article 40 of Declaration of London Applied in Case of Continuous Voyage. In the case of the *Maracaibo,* Sir Samuel Evans held that the rule of Article 40 of the Declaration of London which makes a contraband carrying vessel liable to condemnation when more than half the cargo consists of contraband, and as applied in the case of the *Hakan,* a neutral vessel destined to an enemy port, applied equally to the case of a vessel destined to a neutral port and carrying contraband with an ultimate enemy destination. The owners contended that the rule applied in the case of the *Hakan* was not applicable to the case of a ship like the *Maracaibo* which was destined to a *neutral* port; in short, it did not apply to a case of continuous voyage and that in such case knowledge on the part of the shipowner that the voyage was a contraband undertaking must be proved and proved affirmatively by the captors. Sir Samuel said he saw no good reason for any such distinction. The effect upon belligerents of carrying contraband was the same in both cases and it was difficult to see why the penalty in the case of the vessel should be different. As to the element of knowledge on the part of the shipowner, it had, he said, been eliminated by Article 40 when more than half the cargo consists of contraband and this principle applied whatever the circumstances or facts as to the carriage. He concluded:

"In other words, if a vessel in proceeding to a neutral port carries a cargo and is properly captured as prize, because it is absolute or conditional contraband destined ultimately for enemy territory, or for enemy forces or bases of supply, the offence of the vessel is the same as if she were carrying conditional contraband to an enemy port; and it would seem to me that the same penalty in respect to the vessel should follow. If it is not necessary to prove the knowledge of the owners in the one case, it ought not to be in the other."

The German and Italian Prize Courts similarly confiscated neutral ships destined to neutral ports and carrying contraband

with an ultimate enemy destination.[1] It may also be observed that the German Prize Court applied Article 40 to the case of a tug boat carrying contraband, not as cargo aboard but which consisted of a lighter towed by the boat and which the Court pronounced to be contraband.[2] In determining the proportion between the contraband and non-contraband cargo, the German Prize Court appears to have paid little attention to the volume but took into consideration the value, the weight, and the freight.[3]

II

Immunity of Contraband Carrying Ship on Return Voyage

Sec. 433. Provision of Article 38 of Declaration of London. Article 38 of the Declaration of London provides that a ship may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end. This rule that a vessel which has once succeeded in transporting contraband to a belligerent is not liable to seizure on her return voyage, as she would be if she had successfully broken a blockade outwards, was in accord with the general practice prior to the late war. In the case of the *Allanton* the Russian Prize Court during the Russo-Japanese war of 1904-05 condemned a vessel which was alleged to have transported contraband to Japan and which was seized on her return voyage while carrying an innocent cargo. But the decision was challenged by the British government and Article 38 of the Declaration of London declares such a seizure to be illegal.[4]

Nevertheless, soon after the outbreak of the late war Great Britain, France, and Russia put into effect Article 38 subject to the reservation that a vessel should be liable to condemnation in such a case if she had succeeded in carrying contraband to the enemy by means of false papers.[5] Germany and Austria-

[1] The *Pomona* (II *Entsch.* 147), the *Atlas* (*ibid.*, 256) and the *Kyzicos* (Fauchille et Basdevant, *Jurispr. Ital.* 57).

[2] See the curious case of the *Gouwzee* and *Zuiderzee* (I *Entsch.* 305; Fauchille et De Visscher, *Jurispr. All.* 230).

[3] See, for example, the *Batavier II* (I *Entsch.* 357), the *Berkelstroom* (*ibid.*, 318), the *Zaanstroom* (*ibid.*, 118) and the *Balduin* (*ibid.*, 285).

[4] As to this case see Hershey, *International Law and Diplomacy of the Russo-Japanese War*, pp. 171-73.

[5] British Order in Council of August 20, 1914; French Decree of August 25, 1914; Russian Ukase, Sept. 1-14, 1914.

Hungary, by way of reprisal, soon followed the example of their adversaries and proclaimed that the vessel in such cases should not only be liable to capture on the return voyage but at any time up to the end of the war.[1]

Sec. 434. Interpretation by British Prize Court. Case of the "Alwina." The only important case involving the application and interpretation of Article 38 which appears to have come before the Prize Courts during the late war was that of the *Alwina*[2] decided by the British Prize Court at London. The *Alwina* was a Dutch vessel which carried a cargo of coal ostensibly for consignees on the river Plate but originally and actually intended for the use of German war ships in the South Atlantic. On the outward voyage she stopped at Teneriffe for "bunkers" and there after a stay of several weeks sold the cargo to British merchants, thus abandoning the original intention to carry contraband to the enemy. During her return voyage she put into Falmouth for repairs and was there seized. Sir Samuel Evans released the ship on the ground that having definitely abandoned, before seizure, her intention to carry contraband to the enemy she was not liable to condemnation when seized on the return voyage. Sir Samuel considered at great length the law and practice in such cases. Adverting to the practice he said:

"The general rule which has been acted upon is that when a neutral vessel carries contraband goods they are confiscable if captured *in delicto*; and that the vessel also, if it belongs to the same owner, or if the owner has been implicated in a transaction veiled over with false papers or other deceitful devices, is subject to the same penalty. But when the goods have been deposited at the port or place of destination, the ship and cargo upon the return voyage are exempt from the penalty—*vide* the *Imina* (1800), (3 Rob. 167; I Eng. P. C. 289). But exceptions were made at the beginning of the last century where the outward voyage was made under false papers or with a false destination, or in circumstances where the voyage had been conceived and contrived so as to deceive and practice a fraud upon a belligerent. In these latter cases the vessel and cargo have been held to be affected upon the return voyage also.

"It was, however, strenuously argued before me that according to the law of nations, as now understood, the vessel and her cargo upon the return voyage are free from the risk of capture in respect to contraband goods on the outward voyage, however that voyage was conceived or carried out. In one aspect of the present case no question relating to the law applicable to the return voyage would arise. In the other, it would; and I will therefore consider the question later."

[1] German Prize Code, article 40, par. 2 (Amendment of Apr. 18, 1915); Austro-Hungarian *Dientsbuch*, article 19, par. 2.
[2] V Lloyd 127; II Br. & Col. Pr. Cas. 186.

Then considering the question as to the effect of the abandonment of the original intention, he continued:

"The original intention of the owner was to carry contraband goods to, and deliver them to, the enemy. That intention continued until the vessel failed to obtain bunker coal at Teneriffe, and possibly until the sale to Hamilton & Co. But in fact the goods were never carried or delivered to the enemy at all; on the contrary, they were sold and delivered to a British firm. This course was no doubt forced upon the vendor; but in these circumstances could any penalty afterwards attach to the ship arising out of the original intention and its attempted performance?"

Observing that the terms "offence" and "penalty" often used in connection with contraband traffic were inapt and out of place, since there was no offence on the part of neutrals in supplying belligerents with contraband goods, he said:

"But according to the principles of prize law, if the intention and voyage have been clearly abandoned before seizure or capture, the offence is dissipated and purged, and neither the goods nor the carrying instrument are subject to the penalty of confiscation, the *delictum* being over. This is the reason, I think, why no authority can be produced to the contrary. A similar principle applies where vessels have intended to run a blockade."

Sir Samuel then reviewed a number of cases, English and Japanese, and discussed the effect of carrying false papers. On this point he said:

"It will be observed from the authorities and from the provisions of the Declaration of London as modified and adopted, which will be cited and considered hereafter, in reference to the outward voyage of contraband cargo and the effect upon the ship's homeward voyage if false papers were carried on the outward voyage, that the assumption has always been that the contraband goods have been captured *in delicto* while upon the intended voyage to the enemy destination; or, in the case of a capture of a vessel on her return or homeward voyage, that the contraband goods had actually been delivered to the enemy or carried to the enemy destination."

Returning again to the question as to whether a vessel which may have been subject to capture and confiscation for carrying contraband on an outward voyage remained subject thereto on the return voyage if she carried false papers on the outward voyage or had a false destination or was otherwise engaged in a deceptive or fraudulent transaction for the purpose of defeating legitimate belligerent rights, Sir Samuel reviewed a series of

decisions by the British Prize Courts laying down the affirmative view. Adverting to the criticism of these decisions by Wheaton and others as an "innovation not founded upon principle" and as an indefinite extension of the rule of confiscation, he said he did not think the criticism sound or their conclusions warranted. He pointed out that the opposite view to that of Wheaton was adopted by the United States Supreme Court in 1834.[1] Finally he cited various English textwriters in favor of the right of capture on the return voyage where false papers were carried on the outward voyage. He therefore concluded:

"In these circumstances, whatever may have been written by jurists, I am not prepared to pronounce that the rule of international law upon the subject which has been declared and acted upon in this country by the highest Prize Courts, as also in those of America, has ceased to be in force.

"The ease with which, in the circumstances of modern maritime trade, papers and destinations can be falsified, and frauds can be carried out, in no way minimizes the obligations of neutrals engaged in such trade in time of war to act with frankness, straightforwardness and good faith.

"I accordingly should hold that a vessel which had been used by its owner by means of false papers, with false destination and any such deceitful practices intended to elude the right of capture by belligerents, to carry contraband goods to the enemy, and which had delivered such goods on an outward voyage, remains confiscable on the return voyage. What would constitute the return voyage would depend upon all the circumstances of the particular case."

Upon appeal the judgment was affirmed by the Judicial Committee.[2] Lord Sumner, speaking for the Committee, declared that there was no doubt that the provisions of the Orders in Council of August 20 and October 29, 1914, were meant to operate in favor of neutrals and to restrict the belligerent rights of His Majesty's government and whether they differed materially from the general rules of international law it was unnecessary to inquire. It was enough to say that the ship never succeeded in carrying contraband to the enemy and that she never proceeded to an enemy port. She had, therefore, the good fortune to fall outside the cases specified and to escape condemnation.

In the case of the *Edna*,[3] a neutral vessel which during the course of a voyage in October 1914 carried coal to the German Cruiser *Leipzig* and after completing another trading voyage to Mexico in 1915 was captured by a British cruiser in 1916, Lord

[1] *Carrington* v. *Merchants' Ins. Co.*, 8 Wheat. 495.
[2] V Lloyd 151; III Br. & Col. Pr. Cas. 54.
[3] IX, *ibid.*, 51; III, *ibid.*, 407.

Sterndale referred to the case of the *Alwina* as authority for the view that a vessel was not liable to capture on a second or third voyage following the first one on which she had transported contraband to the enemy. In the case of the *Edna*, however, it was argued by the Crown that the ship was an auxiliary cruiser and, unlike a contraband carrier, she was liable to capture on a subsequent voyage. Lord Sterndale admitted that if she were an auxiliary cruiser she might possibly be so captured but he held that she was not such but a carrier of contraband only and that the "seizure took place far too late by two or three voyages to justify it on that ground." [1]

The German Prize Court likewise refused to condemn a neutral vessel (Norwegian) captured during the course of a voyage subsequent to one in which she had succeeded in carrying contraband to the enemy.[2]

III

Status of Ship and Cargo. Ignorance of Hostilities or of Declaration of Contraband

Sec. 435. Provisions of Article 43 of Declaration of London. By Article 43 of the Declaration of London if a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to costs and expenses incurred by the captor in prize proceedings and on account of the custody of the ship and cargo. A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband if she left a *neutral* port subsequent to the notification to the power to which such port belongs, of the outbreak of hostilities or of the declaration of contraband, respectively, provided such notification was made in sufficient time. She is likewise deemed to be aware of the existence of a state of war if she left an *enemy* port after the outbreak of hostilities. By allowing the belligerent the right of preëmption he is enabled to prevent contraband shipped before the outbreak of war from reaching the enemy but since the neutral has a right to trade with whomsoever he likes

[1] See further as to this case, Sec. 315, *supra*, and 447, *infra*.
[2] The *Draupner* (II *Entsch.* 162).

in anything he has to sell, up to the outbreak of war, it is only just that he should be compensated for his goods thus intercepted. When the late war broke out Article 43 had already been incorporated in the prize regulations of a number of states or was incorporated in them thereafter, although in some cases with modifications. Thus the German prize ordinance [1] laid down certain facts that must be taken into consideration in determining whether the vessel had knowledge of the existence of hostilities or the declaration of contraband, such as the state of telegraphic facilities, the notification of neutral governments, etc.

Sec. 436. The Same. Interpretation by British Prize Court. The Prize Courts of Great Britain, Germany, and France were called upon in a number of instances to apply and interpret the rule of Article 43 or their own prize regulations which embodied the rule in modified form. In the case of the *Katwijk*,[2] a Dutch ship which sailed on September 16, 1914, from a Spanish port with a cargo of iron ore consigned to Rotterdam and held to be ultimately destined for Krupp's works at Essen, but which had not been declared to be contraband until September 21, after the ship sailed, Sir Samuel Evans released the ship but ordered the sale of the cargo. In the course of his judgment, he said:

"Now, the ship belongs to a Dutch company. It is admitted that the ship sailed upon this voyage on September 16 carrying this cargo, which was then not contraband. Therefore she started upon a perfectly innocent voyage. According to the principles which were agreed upon in the Declaration of London—principles upon which I think it would be right for this Court to act, apart from the binding character of the Declaration as adopted by Order in Council—the ship could not be condemned by reason of the cargo being declared contraband after the voyage began."

Sec. 437. The Same. Interpretation by German Prize Court. In the case of the *Elsa* [3] the German Prize Court condemned a cargo of mining timber shipped on a neutral vessel which sailed from a Swedish port to a Scotch port on April 24, 1915, the timber having been declared absolute contraband by an imperial ordinance published on April 20, four days prior to the sailing of the vessel. The claimant relying upon Article 44 of the prize ordinance which lays down certain elements that must be taken into consideration in determining whether a vessel is aware of the existence of hostilities or a declaration of con-

[1] Art. 45. [2] II Lloyd 317; I Br. & Col. Pr. Cas. 282.
[3] I *Entsch.* 75; Fauchille et De Visscher, *Jurispr. All.* 56.

traband, in accordance with Article 43 of the Declaration of London, contended that although the vessel sailed four days subsequent to the declaration of mining timber as absolute contraband the master was not aware of the declaration. The Prize Court held that there was no legal presumption that the ship had such knowledge and that the burden of proof was not on the claimant to show that he had it. The criteria laid down in Article 44 of the prize ordinance were not rules of obligatory proof. Considering the state of telegraphic communications between Germany and Sweden and the short interval of time elapsing between the publication at Berlin of the order placing mining timber on the list of absolute contraband and the sailing of the vessel the presumption of knowledge was uncertain. The cargo was nevertheless condemned because it was from the outset conditional contraband and was destined to an enemy base of supplies (Granton, near Edinburgh). The same decision was reached in the case of the *Oscar*,[1] a Norwegian bark laden with mining timber, destined to the same port, and which sailed from the port of Christiania April 10, 1915, eight days before mining timber was put on the list of absolute contraband. There was no proof, said the Court, that the vessel was aware of the declaration when it sailed; nevertheless the cargo was condemned for the same reason as in the case of the *Elsa*. But in the case of the *Björn*,[2] a neutral vessel which sailed from a Swedish port for an English port, on May 10, 1915, three weeks after the goods which it carried had been placed on the list of contraband, the Prize Court held in effect that if the master was not aware of the declaration it was due to his own indifference.

Sec. 438. Interpretation by French Prize Council and Italian Prize Commission. The French Prize Council in the case of the *Insulinde* [3] held that where a quantity of rubber was proclaimed to be contraband on October 3, 1915, and seized on board a neutral vessel (Dutch) which during the course of a voyage from the East Indies touched at Suez on October 3 and at Port Said the day following, the captain could not be presumed to have known at Port Said of the publication in the *Journal Officiel* the day before, of the declaration placing rubber on the list of contraband. Consequently the French State was bound under Article 43 of the Declaration of London to make compensation for the rubber condemned. But in the case of the

[1] I, *ibid.*, 114; *ibid.*, 87.
[2] Fauchille, *Jurispr. Franc.* 21.
[3] *Ibid.*, 152; *ibid.*, 122.

Gorontalo[1] it refused compensation for goods condemned on a vessel which during the course of its voyage touched at Marseilles and while there a declaration having been published placing on the list of contraband the goods in question. The decision, however, was based on the fact that the claimants could not establish their right to the goods, the Council having admitted that Article 43 of the Declaration of London gave the proper owners the right to an indemnity in a case such as this.[2]

On the contrary in the case of the *Karimata*[3] when the vessel stopped at Port Said at a date sufficiently long after the declaration of contraband had been published in France to have been known at Port Said, compensation was not allowed for the contraband condemned.

In several cases also contraband goods were released by the French Prize Council when their hostile destination and consequently their contraband character, in view of the date of embarcation, could not be considered as having been established.[4]

The Italian Prize Commission applied Article 43 and allowed the claimants compensation for certain goods seized as contraband on a neutral vessel which sailed from Genoa for Salonica on August 29, 1915, and which was seized on September 3, the goods having been declared absolute contraband the day before the seizure.[5]

Sec. 439. Article 43 Does Not Protect Contraband Goods Belonging to Enemy. In the cases referred to in the preceding sections where compensation was allowed for goods condemned as contraband because of the ignorance of the master of the declaration of contraband the goods were owned by *neutrals*. Suppose they are owned by an enemy subject, would they be liable to condemnation notwithstanding the Declaration of Paris? Article 43 of the Declaration of London is not entirely clear on that point and the prize regulations did not pronounce on the question, except that there is a note to Article 44 of the German prize code which declares that where an enemy vessel is captured at sea while unaware of the existence of hostilities or of the declaration of contraband the contraband cargo on board if owned by enemy subjects is liable to condemnation without compensation. The British Prize Court adopted the view embodied

[1] *Ibid.*, 72.
[2] Upon appeal, the claimants to a part of the cargo were awarded compensation.
[3] *Ibid.*, 62.
[4] The *Eir* (*ibid.*, 32) and the *Atlas* (*ibid.*, 39).
[5] The *Kyzicos*, Fauchille et Basdevant, *Jurispr. Ital.* 57.

in the German prize code and denied compensation in such cases. In the case of the *Rijn*,[1] a neutral vessel to which contraband goods had been trans-shipped from a German vessel and which goods were held to have become the property of enemy subjects at the time of seizure, Sir Samuel Evans decided that the claimants were not entitled to the protection of Article 43. Adverting to their contention that under Article 43 they were entitled to compensation he said:

"I think it is clear from the terms of the Article, and of the comment, that it was only intended to comprehend neutral ships and cargoes; i.e., it applies only to ships of neutrals innocently carrying cargo which turned out in fact to be contraband; and to cargo of neutrals which was in fact contraband and was innocently laden and carried on a neutral ship.

"If the cargo was contraband, both an enemy ship carrying it and the cargo to whomsoever it belonged, would be subject to capture and condemnation, and an enemy cargo on a neutral ship would also be similarly subject, notwithstanding the Declaration of Paris."

The judgment was affirmed by the Judicial Committee.[2] In the case of the *Sörfareren* [3] Sir Samuel discussed this point more at length. In this case a cargo of chrome, absolute contraband, belonging to a German company, was shipped on a neutral vessel chartered to the German company. Again Sir Samuel held that Article 43 was not intended to save from condemnation contraband belonging to an enemy. In the course of his judgment he said:

"If the Article were construed strictly, it might be contended with some reason that the only protection intended was in favour of neutral vessels against the consequences to them of the condemnation of the cargo or certain proportions of it. It is silent as to the effect of knowledge or want of knowledge of the contraband nature of the goods on the part of the owners of the goods. I express no final opinion on this point. But at the most, I think the Article was intended to give, and only does give, protection to neutrals whose goods were being carried at sea when their owners were unaware of the declaration of contraband, by awarding to them compensation on condemnation of their goods which were in fact, although not with their knowledge, contraband at the time of capture. This is an intelligible extension in favour of neutrals of the provisions in their favour in the Declaration of Paris. Having given the matter my best consideration, I decide that contraband belonging to the enemy remains liable to condemnation without compensation. It will be remembered that the report of the Drafting Committee to the Naval Conference, which consisted of Representatives of Germany, the United States of America,

[1] VI Lloyd 181; II Br. & Col. Pr. Cas. 507.
[2] VI, *ibid.*, 208; III, *ibid.*, 362. [3] IV, *ibid.*, 174; I, *ibid.*, 589.

Austria-Hungaria, Spain, France, Great Britain, Italy, Japan, the Netherlands, and Russia—which is generally known as Monsieur Renault's Report—is declared by the Order in Council already mentioned by an authoritative Report, to which this Court is directed to have regard.

"That Report says as to Article 43

> 'This provision is intended to spare *neutrals* who might in fact be carrying contraband, but against whom no charge could be made.'

"This confirms me in the opinion I have expressed, which indeed I should have formed, and did form, without reference to the Report."

The judgment was affirmed, on appeal, by the Judicial Committee.[1]

In the case of the *Leda*,[2] a German ship captured at sea near Bermuda on August 8, 1914, four days after the outbreak of war between Great Britain and Germany, the owners invoked the benefit of Article 43 which protects a vessel encountered at sea in ignorance of the existence of hostilities, against confiscation. They argued that Article 57 of the Declaration of London which makes the enemy or neutral character of a vessel dependent upon the nationality of the flag which she is entitled to fly, was destroyed by Article 43. But the Prize Court of Bermuda, before which the case was heard, rejected the argument. "Article 57," it said, "comes under chapter 6 headed 'enemy character,' whilst article 43 is one of those included in chapter 2 headed 'contraband of war.' A comparison with the other articles shows that articles 22 to 44 deal with contraband. . . . Article 43, I am convinced, applies to ships other than enemy vessels having contraband on board." The Court added that the general Report of the Naval Conference supported this view.

Article 43 was invoked and denied under peculiar circumstances in the case of the *Kronprins Gustaf*.[3] A list of contraband which included coffee (the goods in question) had been published by the British government in August 1914 but in November following notification was sent to various neutral countries that the British government would treat as contraband

[1] To the same effect see the case of the *Craigisla*, decided by the Prize Court of South Africa (Cases Decided in the Prize Courts of South Africa, p. 73), where it was held that Article 43 did not apply to the case of contraband owned by an enemy and laden on a neutral vessel which entered the port of Luderitzbucht on Sept. 9, 1914, in ignorance of the outbreak of hostilities, there being no evidence that the master upon learning of the outbreak of war attempted to withhold delivery of the goods to the enemy consignees. On the contrary, by continuing to discharge the cargo after he became aware of the outbreak of hostilities the master lost any benefit attached to his ignorance.

[2] I Br. & Col. Pr. Cas. 233.

[3] IX Lloyd 137; III Br. & Col. Pr. Cas. 432.

only certain articles, which did not include coffee. This notice was communicated to the Swedish government (the vessel was Swedish) but was not communicated to the government of Brazil, from which the vessel sailed. But notification of the list of contraband articles, which included "foodstuffs," was sent to the Brazilian government in August 1914, some months before the vessel sailed. Under these circumstances the Prize Court held that the ship must be deemed to have been aware of the notification transmitted in August. But the claimants while admitting that this might be true, if the ship had belonged to a Brazilian owner, contended that since she belonged to a Swedish owner it could not be true because the notification was given to the Swedish government in November 1914 that coffee would not be treated as contraband and consequently Swedish owners might continue to ship coffee until notice had been given the Swedish government in time to enable them to notify their ships of the withdrawal of the contraband list published in August 1914. Lord Sterndale rejected this contention although he did not think it necessary to decide the precise point, and held that the ship must be deemed to have been aware of the fact that the goods were contraband when she sailed from a Brazilian port.

IV

The Doctrine of Infection

Sec. 440. Interpretation by British Prize Court. By Article 42 of the Declaration of London innocent goods on board a vessel carrying contraband of war, when belonging to the owner of the contraband goods are condemnable equally with the contraband part of the cargo.[1] This is the doctrine of infection which had long been a rule of Anglo-American prize law and Article 42 was therefore merely declaratory of the existing rule and practice. In the case of the *Kronprinsessan Margareta and Other Vessels*[2] Lord Sumner speaking for the Judicial Committee said that for about 150 years, at least, the law of prize had

[1] See also the General Report accompanying the draft of the Declaration. But if the innocent goods belong to another shipper than the owner of the contraband they must be released even when they belong to an enemy subject, though the latter is not entitled to damages for the detention. Bentwich, *Declaration of London*, 81.

[2] VIII Lloyd 241; III Br. & Col. Pr. Cas. 803.

contained two settled rules. One of them was the invalidity of the transfer of movables afloat from an enemy to a neutral when the transfer was unaccompanied by actual delivery of the goods; the other was the liability to condemnation of goods as though they were contraband, which although not condemnable in themselves, belong to, or are deemed to belong to the same person who is the owner of other cargo on the vessel which itself is liable to condemnation. He said:

"Their Lordships are fully aware that some Continental jurists have criticized the rule of infection adversely and that Continental prize courts have not always accepted it, although it has long been adopted in the United States and more recently in Japan. The history of the rule is obscure. A reference to some of the proclamations in Rymer's *Fœdera* suggests that it may have had its origin in the practice followed by the executive during the seventeenth century in successive wars, and the theories on which writers like Zouch, Bynkershoek, and Heineccius appear to proceed seem rather to have been an effort to find in their erudition some *ex post facto* warrant for an accepted rule than an historical statement of the reasons which actually guided those who laid it down.

"That the so-called doctrine of infection does not really rest, in spite of many passages which suggest it, on the personal culpability or complicity of the owner of the goods is shown by the fact that, if it were so, excusable ignorance would be an answer, and for this there is no authority. The term is as old as the Treaty of Utrecht (A. D. 1713), but the doctrine is perhaps unfortunately named. From the figure which describes the goods as contaminated when seized, the mind passes to the analogy of a physical taint, which runs through the entire cargo in consequence of its being in one bottom, and begins on shipment, or, at least, on sailing. Hence, 'once infected, always infected,' is assumed to be the rule, and a buyer would get a tainted parcel, even though he became owner before seizure, and was recognized as such. This is inconsistent with the view that the rule is a penal rule, and it certainly has been said to be, but it is argued that the penal effect is only accidental, and that the real foundation is the belligerent's right of capture, which may arise as soon as the ship gets out to sea. 'Infection' has then attached to all the goods afloat in one common ownership, and to purge it by a subsequent transaction and transfer of ownership on land would be to defeat an accrued belligerent right. This reasoning is answered as soon as it is appreciated that 'infection'—that is, the liability of a particular owner to a derivative condemnation of his goods—is not a quality of the goods themselves, but is an incident of the owner's position, when the capture is made and the captor's right arises."

Lord Sumner concluded:

"It has been contended that this is a rule applied for the purpose of determining the status of goods, and that it is only so applicable; that it decides whether the goods have enemy or neutral character, but not

whether they, being neutral and in themselves innocent, can be condemned as having been infected by other cargo which is contraband. No authority has been cited for this proposition. Whether the foundation of the rule be taken to be the tendency of documentary transfers to encourage evasion and fraud, so as to defeat a belligerent's right in one way, or the tendency of changes of ownership in transit to make the right of seizure at sea precarious, and so to defeat in another way the correlative belligerent right, namely, the right to obtain a condemnation of belligerent rights as those now in question."

In the case of the *Kim and Other Vessels* Sir Samuel Evans adverting to the contention of the claimants that even if the cargoes on the four ships were held to have an enemy destination the non-contraband portions thereof could not be confiscated, stated that they would be equally liable to condemnation in consequence of having been "infected" by the presence of the contraband goods the owners of which also owned the innocent goods.[1]

Sec. 441. Interpretation of Continental Prize Courts. The French Prize Council applied the rule in the case of certain non-contraband goods captured on the Norwegian steamer *Oscar II*,[2] the owners of which were also the proprietors of the contraband portions of the cargo. So did the Austro-Hungarian Prize Court in a case where a cargo consisting in part of contraband and in part of non-contraband goods was destined to the government of Montenegro.[3] The Prize Commission of Italy likewise applied the rule in the case of the *Kyzicos*.[4] The German Prize Court applied it in various cases.[5]

[1] Later, in the case of the *Kronprinsessan Margareta* Sir Samuel Evans declared that the rule as to infection was "too well settled to be disturbed," that it was "simple and broad," and that it had "come from ancient times right down to the days of the Declaration of London and had been applied in all maritime wars, for at any rate, a century and a half." Counsel for the claimants in this case did not question the validity of the doctrine but denied that it was ever intended to be applied in a case such as this, where, according to their view, the only effect would be to inflict hardship on innocent neutrals. Sir Samuel, however, replied to this argument by saying that "the apprehension of the learned counsel that its application in the present cases would be an unreasonable extension of the principle does not appear to me to have any foundation." See also the opinions of Lord Sterndale in the *Parana* (III Br. & Col. Pr. Cas. 482), the *Antwerpen* (*ibid.*, 486) and the *Rena and Other Vessels* (VIII Lloyd 193).

To the same effect see, among various other cases, the decisions of the South African Prize Courts in the *Siljan* and the *Portugal* (Cases Decided by the South African Prize Courts, pp. 89, 127).

[2] 27 *Rev. Gén., Jurispr.* 86; and 30, *ibid.*, 15.

[3] The *Kephallonia* (*supra*, Secs. 113, 248).

[4] Fauchille et Basdevant, *Jurispr. Ital.* 57.

[5] See, among others, the *Hudiksvall* (I *Entsch.* 369), the *Batavier VI* (II, *ibid.*, 22) and the *Blommersdijk* (II, *ibid.*, 108).

V

Necessity and Procedure of Search

Sec. 442. Right and Duty of Search. By a long established customary rule of the law of nations belligerents are allowed to stop and search (or "visit" according to the Continental European terminology) merchant vessels met at sea in order to verify their nationality, the character and destination of their cargoes, the object of the voyage, and to ascertain whether the ships have on board contraband, enemy dispatches or persons incorporated in the enemy armed forces.

It is also the duty of the captor before destroying a merchant vessel to stop and visit it in order to satisfy himself by an examination of the ship's papers whether it is an enemy vessel, and if so whether it belongs to the class of vessels which are not exempt from capture and therefore from destruction. If the ship is destroyed because it is engaged in the transportation of contraband it should be searched for the purpose of ascertaining whether the goods are really contraband in character and if so whether the proportion between the contraband cargo and the total cargo is sufficient under the international conventions to render the ship liable to destruction.

Only by this procedure may the captor be sure that the destruction is legally justified. It is also the duty of the captor in such cases to take off the ship's papers for the assistance of the Prize Court in passing upon the validity of the destruction.

In a large number of cases, however, the commanders of German and Austro-Hungarian submarines did not observe this essential formality during the late war but sunk both enemy and neutral merchant vessels at sight without examination of their papers or cargoes.[1] In affirming the validity of such acts the German and Austrian Prize Courts usually stated that "it being impossible to search the vessel, it was sunk." [2]

Sec. 443. Taking of Prizes into Port for Search. Controversy Between the United States and Great Britain. Must the right of search be exercised at sea where the vessel is stopped or may it be taken into a home port and there searched

[1] As to their practice in this respect, see my *International Law and the World War*, Vol. II, Ch. 31.

[2] See, among others, the decisions of the Austro-Hungarian Prize Court in the case of the *Elmsgrove*, the *Salmonpool* and the *Algerien*, *Normalverordnungsblatt für die K. u. K. Kriegsmarine*, 10 *Stück* (1917), pp. 102, 106, 110.

when the examination cannot be conveniently or effectively made at sea? A controversy took place during the late war between the governments of the United States and Great Britain regarding this matter. Large numbers of American and other neutral merchant vessels were taken into or compelled to enter English ports (in most cases, the port of Kirkwall) where they were detained, sometimes for long intervals, for the purpose of being searched. Against this practice the American government protested. It admitted the right of belligerents to detain neutral vessels where there was "sufficient evidence to justify a belief that contraband goods were in their cargoes," but it denied their right to take neutral ships into British ports and detain them on mere suspicion "for the purpose of searching generally for evidence of contraband, or upon presumptions created by special municipal enactments which are clearly at variance with international law and practice." [1] Such evidence could be properly obtained only by searches at sea and this, it was declared, had been the practice of American naval commanders during the Civil War, the assertions of the British Foreign Office to the contrary notwithstanding. The American government also complained of the unwarranted delay and the expense of detention which had to be borne by the owners, and pointed out that the effect was to deter American citizens from engaging in lawful trade ventures.[2]

Sir Edward Grey in his reply to this protest maintained that under modern conditions it was essential where there was real ground for suspecting the presence of contraband that the vessel should be taken into port for examination; he pointed out that large quantities of contraband were concealed or mislabeled; that in view of the large size of modern steamships and the great volume of their cargoes it was often impossible to conduct an effective search at sea and that consequently they must be taken into port where the cargo could be unloaded and the parcels opened. This practice had in fact been followed, he said, by American naval commanders during the Civil War, and by naval commanders during the Russo-Japanese War and the Second Balkan War. Finally, he quoted from a report of Sir John

[1] Mr. Lansing to Mr. Page, Dec. 26, 1914, *Supp.* to 9 *Amer. Jour. of Int. Law* (July, 1915), p. 58. Mr. Lansing's note contained a list of some 300 American vessels that had been taken into British ports and there detained for one reason or another. *European War No. 3, Dipl. Cor. with Bellig. Countries Relating to Neutral Rights*, pp. 40 ff. See also *Cong. Record*, Jan. 11, 1916, pp. 95 ff.

[2] Mr. Lansing to Mr. Page, Oct. 21, 1915, 9 *ibid.*, p. 86.

Jellicoe who affirmed that under modern conditions effective searches at sea were in many cases no longer possible.[1]

Sec. 444. British Prize Jurisprudence. In a number of cases the British Prize Courts upheld the validity of the practice of taking neutral merchant vessels into port for further examination and refused to award damages on account of the detention thereof. Thus in the case of the *Montana*[2] the Commercial Court at Malta (in prize) held that the taking of a neutral vessel into the port of Malta in order that the innocent or contraband nature of the cargo could be determined by a chemical analysis was not unreasonable; that the right of visit and search included that of securing cargo which may appear suspicious and preventing its being discharged at a particular port and that, in the circumstances, the claim of the shipowners for damages on account of the detention of the vessel, which had been released, must be dismissed. "Recent developments in the course of the present war," the Court observed, "have clearly shown that it is not possible in all cases to exercise the right of search in a satisfactory way, owing to the ease with which contraband may be concealed in bales, passengers' luggage, and other receptacles, especially in large ships, and owing to the danger from enemy submarines."

In the case of the *Abonema and Other Ships*[3] the Naval Prize Tribunal thus referred to the necessity and practice of taking ships in for search:

"The size and immense carrying capacity of modern vessels involving a lengthy examination of the cargo carried, together with the growth of the submarine peril, makes it impossible for a belligerent with safety to exercise the former practice of visit and search upon the high seas. In these circumstances the practice has been adopted of diverting neutral merchant vessels, suspected of carrying contraband, to the nearest convenient British port, where the officers of customs, acting under the instructions of the Contraband Committee, take charge and seize as prize such

[1] See especially Sir Edward Grey's notes of Jan. 7, 1915, *ibid.*, at p. 63 and of July 10, 1915, at p. 75, and the memorandum of April, 1916, 10 *ibid.*, pp. 121 ff., and *European War No. 3*, pp. 63 ff. As to the difficulties of search at sea under modern conditions see Pyke, *The Law of Contraband of War*, p. 201; Admiral Stockton, 14 *Amer. Jour. of Int. Law*, 363; Hyde, *International Law*, II, p. 443; and Wise, "The Rights of Visit and Search," 16 *Amer. Jour. of Int. Law* (1922), p. 395, all of whom uphold the British contention that in certain circumstances effective search at sea is impracticable. Baty, however, appears to regard the practice of taking vessels in for the purpose of collecting evidence upon which to condemn them, that is, for "getting up a case," is not warranted. See his article, "Neglected Fundamentals of Prize Law," 30 *Yale Law Journal* (1920), p. 38.

[2] III Brit. & Col. Par. Cas. 340.

[3] VIII Lloyd 284; III Br. & Col. Pr. Cas. at p. 305.

consignments as the committee may direct. Therefore under modern conditions the examination of cargoes as well as the decision to seize goods or ships as prize have passed from naval officers at sea to civilians ashore."

In the case of the *Bernisse and Elve* [1] the Prize Court, and the Judicial Committee on appeal, held that where two neutral vessels had been sent into Kirkwall through mistake as to the meaning of the Order in Council and not for the purpose of search and one of which was sunk by a German submarine and the other injured while passing through the German war zone, the Crown was guilty of a wrongful act. In the course of his opinion Lord Sterndale stated that the whole question of the right of a belligerent to send a vessel into port for examination instead of examination at sea, as was the practice in former times, had been argued by counsel but he did not think, however, that question was involved in the present case and it was not necessary therefore for him to express an opinion on it.

However in the case of the *Zamora* [2] the Judicial Committee expressly affirmed that "the practice of bringing a vessel into harbour for the purpose of search" was justifiable "because search at sea is impossible under the conditions of modern warfare."

Sec. 445. Jurisprudence and Practice of Other Countries. The French Prize Council, likewise, in various cases held that there was nothing "irregular" in taking a neutral ship into port for further examination when by reason of the state of the sea or the nature of the cargo an effective search at the place of capture was not practicable or possible. Thus in the case of the *Federico* [3] a Spanish vessel which had been seized on the suspicion of being engaged in the transportation of enemy *militaires* [4] and taken into the port of Toulon for examination because the condition of the sea was such as not to permit a search at the time and place of capture, the Prize Council upheld the regularity of this procedure and the decision was affirmed by the Council of State. The claimants before the Council of State contended that the condemnation was illegal, *inter alia*, for the reason that the capture had been effected "irregularly" because the condition of the sea permitted an examination of the ship at the place of capture and consequently there was no necessity for taking it into port. The Council of State, however, affirmed, on the basis of a report of the commander of the capturing torpedo boat that

[1] IX, *ibid.*, 243, 256; III, *ibid.*, 517, 771.
[2] IV, *ibid.*, 62; II, *ibid.*, 1.
[3] Fauchille, *Jurispr. Franc.* 19, 288.
[4] See Sec. 115, *supra*, and 449, *infra*.

it was otherwise and that in consequence there was no irregularity in taking the ship into port for examination. Similarly, in the case of the *Bereslo*[1] the Prize Council held that where an examination of a neutral vessel begun at sea, had been interrupted, it might be taken into a French port for completion of the search when, by reason of the situation of the cargo it was impossible to continue the search at sea. Likewise, in the case of the *Rioja*[2] it held that a neutral vessel might be taken in for search when, for reasons of *force majeure* it was not possible to search it at sea.

German captors frequently conducted their prizes into port (*Einbringung*) for the purpose of examination. This procedure they distinguished from formal seizure or capture (*Aufbringung; beschlagnahme*). The Prize Court held that when the search could not be made effectively at sea it was permissible to conduct the vessel into a home port for the purpose of further examination and if suspicion justified the taking of it in the claimants were not entitled to damages although the vessel was released.[3]

The Italian Prize Commission without expressly pronouncing upon the legitimacy of the practice of taking prizes in for further search proceeded on the theory that it was entirely regular and condemned vessels brought in and searched in port.[4]

VI

Unneutral Service

Sec. 446. Conventional Rules and National Regulations. Closely related in character to trade in contraband is unneutral service, or as it is generally called on the Continent of Europe, "hostile assistance," and the jurisprudence of the Prize Courts concerning such questions may be appropriately examined here.

The Declaration of London contains a chapter devoted to the subject (Ch. III. Arts. 45–47) and the prize regulations of most maritime powers reproduce the rules thereof, sometimes in modified form and with additional provisions. The Declaration dis-

[1] *Ibid.*, 84.
[2] *Ibid.*, 141.
[3] The *Stor.* I *Entsch.* 96; Fauchille et Basdevant, *Jurisp.* 43 N. The *Goethe*, I. *ibid.*, 85; *ibid.*, 87; the *Wally*, I. *ibid.*, 228; *ibid.*, 177.
[4] See among others, the cases of the *Aghios Constantinos*, Fauchille et Basdevant, *Jurispr. Ital.* 18; the *Aghios Elena*, *ibid.*, 17; and the *Evangelistria*, *ibid.*, 169.

tinguished between two groups of acts which are treated as unneutral; one, less grave, in which the neutral vessel found guilty of participating in it is subjected to the same treatment which is visited upon a neutral vessel condemned for carrying contraband; the other, more serious, in which the guilty vessel receives the same treatment which is applied to an enemy merchant vessel. Falling within the first group of acts are voyages undertaken especially with a view to the transportation of individual passengers who are embodied (*incorporés*) in the armed forces of the enemy or with a view to the transmission of intelligence in the interest of the enemy. (Art. 45.) In the second group are included acts involving direct participation in hostilities, sailing under the orders or control of an enemy agent, being in the exclusive employ of an enemy government and being engaged exclusively in the transportation of enemy troops or in the transmission of intelligence in the interest of the enemy (Art. 46). By Article 47 any individual "embodied (*incorporé*) in the armed forces of the enemy" who is found on board a neutral merchant vessel may be made a prisoner of war, even though there may be no ground for the capture of the vessel. This rule represented an innovation upon the old practice under which no person could be taken off a neutral vessel by a belligerent cruiser, if the vessel itself was free from capture.[1]

The prize regulations of several countries treat as acts of hostile assistance, certain other acts than those enumerated in the Declaration of London.[2] In the case of the *Thor*[3] the Royal Court of St. Lucia sitting in prize, dealing with the case of a neutral vessel which had sailed before the outbreak of war with a cargo of coal, ostensibly bound for another neutral port but whose destination was changed without the knowledge of her owners and the coal taken to certain German warships in the western Atlantic, considered the question as to whether the rule of the Declaration of London was in accord with the customary English practice. Citing the case of the *Rebecca* (1811)[4] the Court stated that the English rule was that "a neutral vessel chartered or employed by a belligerent government to carry a cargo on its behalf and acting under the orders or direction of that government or of its officers is liable to condemnation as an enemy ship, together with the cargo so carried." Then quoting the language of Article 46 of the Declaration of London

[1] Bentwich, *The Declaration of London*, p. 91.
[2] They are set forth by Verzijl, *op. cit.*, pp. 958-961.
[3] I Br. & Col. Pr. Cas. 229. [4] 2 Acton 119.

which reads: "A neutral vessel will be condemned . . . if she is under the orders or control of an enemy agent placed on board by the enemy government" or "if she is in the exclusive employment of the enemy government," Chief Justice Coller said:

> "I confess, with great respect, that I do not think the change altogether happy, nor do I find the rule, as enunciated, particularly clear. It would, I think, have been better to say, 'If she is chartered or employed by the enemy government or its agents for purposes of transport or supply.'"

Nevertheless, he added, the meaning became clear by reference to the official Report accompanying the Declaration, which left no doubt that transports were included in the category of vessels liable to condemnation; colliers which, accompanying a hostile fleet, were expresssly mentioned in the Report as being transports; and although in this case there was no "accompanying" a hostile fleet, the offense lay rather in the intention of employment than in its literal fulfillment. The vessel was therefore condemned as lawful prize, the cargo having already been condemned in default of appearance.

Sec. 447. Revictualment of Ships of War. Taking up in turn the several classes of acts of unneutral service which came before the Prize Courts we may begin with those which involved the transportation of supplies to enemy warships. In the case of the *Helicon,*[1] a Norwegian ship seized by a German cruiser in the Pacific Ocean on the ground that it had on board a cargo of coal destined for the use of English cruisers, the German Supreme Prize Court based its decision on the fact that the cargo was contraband, the question of hostile assistance being passed over in silence.[2]

In the case of the *Heina* [3] the French Prize Council condemned a neutral vessel and its cargo, on the ground that the vessel was under charter to a German steamship company and was engaged in the transportation of fuel and provisions to the naval forces of Germany in the Atlantic and had on board a German agent specially embarked for that purpose. Two other vessels (with their cargoes), which were engaged in delivering petrol to

[1] I *Entsch.* 411; Fauchille et De Visscher, *Jurispr. All.*, 164 and 313.

[2] In a number of other cases neutral vessels were seized by German warships on the suspicion of hostile assistance, but guilt does not appear to have been established and the task of the Prize Court was limited merely to determining whether the circumstances justified the seizure and whether therefore the owners were entitled to damages. See, among others, the cases of the *Hasenkamp*, the *Pieter Jan*, the *Sydney Albert* and the *Liesbeth Betty.*

[3] Fauchille, *Jurispr. Franc.* 119.

enemy submarines in the Mediterranean sea were similarly condemned [1] and so was a Chinese junk charged with carrying supplies including mineral oil to German cruisers in Asiatic waters.[2]

Aside from the *Thor*, referred to above, the only other neutral vessel condemned by the British Prize Courts for carrying supplies to the enemy was the *Bangor*,[3] a Norwegian vessel captured in the Strait of Magellan while engaged in carrying coal and other supplies to German warships in the South Atlantic. Sir Samuel Evans referred to it as "a flagrant case" in which "circumstances of aggravation of almost every kind actuated her conduct and management."

In the case of the *Alwina* [4] Sir Samuel Evans refused to condemn a neutral vessel laden with coal really intended for German warships in the South Atlantic, for the reason that the vessel had abandoned its original intention and while in a neutral port sold the coal to British merchants, this notwithstanding that the owner had been guilty of fraudulent practices for the purpose of eluding capture. By reason of his conduct, however, the owner was required to pay the costs and expenses of capture and detention, as well as the costs of the proceedings. The judgment was affirmed by the Judicial Committee.[5] In the case of the *Edna* [6] Lord Sterndale refused to condemn a neutral vessel which had been transferred from an enemy flag and which had many months before the transfer and capture rendered help to an enemy warship, and his judgment was affirmed by the Judicial Committee. In this case the Judicial Committee emphasized the distinction between unneutral service and the transportation of contraband and also the distinction between neutral merchant vessels engaged in unneutral service and vessels acting

[1] The *Evangelistria* (*ibid.*, 281) and the *Adelphotis* (*ibid.*, 383).

[2] The *Pao-Hing-Lie* (*ibid.*, 438). See also the case of the *Persepolis* (*ibid.*, 212), where it was held that a neutral merchant vessel was presumed to be engaged in acts of hostile assistance and therefore liable to capture if in addition to certain circumstances confirming this presumption, the ship's papers were irregular, and the master was unable to furnish a justification of the nature of his expedition, his real destination or as to the nature of previous voyages which he had made. See also the case of the *Alfonso XIII* (*ibid.*, 354), where a Spanish vessel was seized on the suspicion of hostile assistance, but the Prize Council was able to condemn it for the sole reason that the master had thrown the ship's papers overboard.

[3] V Lloyd 308; II Br. & Col. Pr. Cas. 207. But in the case of the *Proton* (II Br. & Col. Pr. Cas. 107) the Prize Court for Egypt condemned for unneutral service a vessel flying a neutral flag and nominally owned by a neutral subject and engaged in carrying contraband for the enemy when the nominal owner and master were acting as agents for an enemy government.

[4] V Lloyd 127; II Br. & Col. Pr. Cas. 186.

[5] V, *ibid.*, 153; III, *ibid.*, 54. See also Secs. 385, 434, *supra*.

[6] IX, *ibid.*, 51, 70; III, *ibid.*, 407, 926. See also Secs. 315, 368, 434, *supra*.

as "fleet auxiliaries" to German cruisers operating in the South Pacific. As to the latter distinction Lord Sumner said:

"It must be possible to draw a line between unneutral service and 'fleet auxiliaries,' and between the cases in which neutrals can validly buy and take delivery of enemy ships and the cases in which they cannot; otherwise transactions which are expressly permitted to neutrals might be invalidated by circumstances of which they had no notice and could form no estimate."

And he added:

"Ships which enlist in the service of such armed forces, although not armed themselves, may naturally be the subject of rules more stringent than those which govern ordinary merchantmen. The forces assisted may consist of single ships or of whole fleets. Assistance may be rendered when in company or when detached; it may consist in the supply of coal and stores, or in the collection and forwarding of information. An unarmed ship may be of service as a decoy or as a screen; the assistance may be rendered casually or on a system, voluntarily or under orders, gratuitously or for hire. Such service is not necessarily confined to ships of the country to which the fleet assisted belongs or of a country engaged in the war at all. Again, such a ship may be captured *in delicto*, and while rendering the service, or after the service has come to an end."

Concluding his observations on this point he said:

"Regarding the *Mazatlan* as a ship of enemy character, those in command of her nevertheless held no personal commissions from the German government; she was not even such a 'private ship of war' as was commissioned in the days of privateering; she took no direct part in hostilities; it is not shown that she was under the orders or control of any agent placed on board by the enemy government; she was not even in the employment, still less in the exclusive employment, of such government; she was not under requisition to them; she did not fly the colours of the German navy, nor were her crew subject to military law."

In the case of the *Pontoporos*[1] the Supreme Court of the Straits Settlements (in prize) refused to condemn a neutral vessel (Greek) which had been previously captured by a German cruiser and compelled by force to serve as a collier to the *Emden* and to supply coal to another German warship. The Court held that under the circumstances the supplying of coal to the enemy could not be regarded as "hostile assistance" or "unneutral service" within the meaning of those terms as used by text writers and in the Declaration of London, since the master was not a free agent and there was no contractual relationship, such as the word "service" implies, between the owners, charterers or master

[1] I Br. & Col. Pr. Cas. 371.

and the enemy.[1] Likewise, the Supreme Court of Hong Kong (in prize) refused to condemn on the charge of hostile assistance a neutral vessel which was engaged in transporting refugees from *Tsingtau*.[2] The Crown asked for the condemnation of the vessel, because among other reasons, her voyage was undertaken to gather and convey military information to the enemy. The Court admitted that the conduct of the vessel was suspicious but it did not think that there was any direct evidence to establish the charge of hostile assistance.[3]

The Italian Prize Commission condemned an Albanian schooner and its cargo for hostile assistance in the sense of Article 45 of the Declaration of London, which was not being employed on a permissible commercial voyage but was utilized by the master for supplying enemy submarines and hydro-aeroplanes with gasoline and for furnishing them with military information.[4] But it released a vessel flying the Greek flag, which had been seized on suspicion of furnishing supplies to an Austrian submarine, because as in the case of the *Pontoporos* (*supra*) the master had been compelled by force to do so.[5]

Sec. 448. Transport of Dispatches, Enemy Agents, Etc. In several instances ships flying the flag of the captor state or an enemy flag were condemned for transporting enemy dispatches in the interest of the enemy,[6] although hostile assistance is generally regarded as having reference to assistance rendered by neutral vessels. In the case of the *Iro-Maru*[7] the French Prize Council condemned an allied (Japanese) ship for transporting a German consul in China to Bangkok, Siam. The consul admitted that he was making the voyage to Bangkok upon the order of his government and the evidence indicated that he was an active participant in enemy undertakings in the Orient. He carried sealed papers, among the contents of which was a dispatch from Berlin, which he threw overboard upon the approach of the French cruiser which captured the *Iro-Maru*. On the basis of Article 45 of the Declaration of London the Prize Council

[1] See further as to this case, Sec. 113, *supra*.
[2] The *Hanametal*, I Br. & Col. Pr. Cas. 347.
[3] See further as to this case, Sec. 450, *infra*.
[4] *La Bella Scutarina*, Fauchille et Basdevant, *Jurispr. Ital.* 45.
[5] The *Chrysopolis*, *ibid.*, 162.
[6] For example, the French case of the *Lief Gundersen*, 26 *Rev. Gén.* (1919), *Jurispr.* 46. The French Instructions, 1916, (Art. 23) and the Japanese law of Oct., 1914 (Art. 86), it may be observed, extend the doctrine of hostile assistance to acts committed by national and allied, as well as neutral, vessels.
[7] Fauchille, *Jurispr. Franc.* 323.

condemned the vessel and the decision was affirmed by the Council of State which declared that the voyage of the ship had been undertaken specially for the purpose of transporting the consul to Bangkok in order to enable him to carry out a secret mission under orders of his government.

The Supreme Court of New South Wales (in prize) condemned a British vessel (with cargo) which had been chartered to German officials at Nauru, a German island in the Pacific, to convey a representative with dispatches to the German government at Rabaul, another German possession.[1] The transaction occurred early in August, 1914, after war had broken out between Great Britain and Germany, and while this information was known to the German officials it was not known to the owners of the vessel and was concealed from them by the German charterers. The Prize Court held that although the claimants were innocent this did not alter the situation and since the vessel had been chartered to the German government and was engaged in its service it must be condemned. Following the decision of Sir William Scott in the *Orozembo* [2] the Court held that the test of the liability of the vessel to condemnation was not the knowledge or ignorance of the owners as to the service to which it was to be put, but whether the captor had suffered an injury from the employment of the vessel—a test which must impress one as being particularly severe. After reviewing the cases of the *Orozembo* (1807) and the *Carolina* (1800)[3] the Court concluded:

"The principle to be collected from these and other authorities is that, though the proprietary rights of innocent owners or charterers are not to be prejudiced by the acts of persons other than themselves or those placed in charge of the ship, they are nevertheless amenable to the consequences of acts done by the latter, and that if these allow themselves to be intimidated or cajoled into rendering services to the enemy, the only remedy, if any, open to the owners or charterers, is against the persons who have led the agents of one or other of them into so false a position."

Sec. 449. Transport of Military Persons. The best known case of hostile assistance in this form was that of the *Federico*,[4] a Spanish vessel condemned by the French Prize Council for transporting from Barcelona to Genoa, in October, 1914, certain German and Austro-Hungarian *mobilisés* who were returning to

[1] The *Zambesi*, I Br. & Col. Pr. Cas. 358.
[2] 6 C. Rob. 430. [3] 4 C. Rob. 256.
[4] Fauchille, *Jurispr. Franc.* 19. As to this case see further, Secs. 115, 445, *supra*.

their respective countries in response to a call to rejoin their colors and who were therefore, according to the interpretation of the Prize Council, to be considered as "incorporated" in the armed forces of the enemy.

The owner appealed to the Council of State [1] where he contended that the condemnation of the vessel was illegal because it was not engaged on a voyage specially undertaken for the purpose of transporting passengers "incorporated" in the armed forces of the enemy; that he had purchased the *Federico* to meet the needs of navigation interrupted by the outbreak of the war; that the vessel was employed in periodic voyages for the regular transportation of passengers and freight between the neutral ports of Barcelona and Genoa; that under the interpretation placed upon Article 45 by the delegates to the London Naval Conference and embodied in the General Report and which had been annexed to the text of the Declaration in the diplomatic publications of both France and Spain, only those persons were considered as "incorporated" in the armed forces of the enemy who having been called to the colors in pursuance of the law of their countries had actually rejoined the corps to which they were attached; that the French government having announced by the decree of August 25, 1914, that it would apply during the war the rules of the Declaration of London subject to certain modifications and additions none of which affected Article 45, it followed that the said article must be applied in the sense which its authors had attached to it. The Council of State, however, rejected all these contentions and affirmed the decree of the Prize Council. Regarding the interpretation placed on Article 45 by the Conference and embodied in the General Report, the Council of State declared that it was in the text of the Declaration, rather than in that of the General Report that the rules governing the treatment of neutral vessels engaged in acts of hostile assistance, must be sought. It was established by the examination of the *Federico*, the Council affirmed, that the vessel was specially employed on this voyage as on three preceding voyages, in the repatriation of the nationals of enemy countries who were returning to rejoin their colors. Finally, it asserted, that according to the legislation of the enemy countries to which the passengers belonged, they were temporarily on leave and had not therefore ceased to be "incorporated" in the armed forces of their respective countries and this being the case of the indi-

[1] *Ibid.*, 287.

viduals, officers as well as soldiers, who constituted almost the total of the passengers, and who had been made prisoners of war in pursuance of Article 47 of the Declaration, the Prize Council had rightly condemned the vessel transporting them.

This interpretation of Article 47 was of doubtful validity. Most writers on international law who have discussed the subject maintain that subjects of a belligerent state who have been summoned to join the colors and who are traveling as ordinary passengers on a neutral vessel cannot be taken from it and such transportation does not incriminate the vessel unless the voyage was undertaken especially for their transfer.[1] The *Manuel des Lois de la Guerre Maritime* adopted by the Institute of International Law in 1913 expressly excludes from the rule prohibiting the transportation of troops those who have not yet rejoined their corps even though it is their intention to do so and who are traveling as simple passengers without connection with the military service.[2] As counsel pointed out in their argument, it was also clear from the General Report of the Naval Conference that it was not the intention of the Conference to apply the rule to such persons, and the Council of State in refusing to take into consideration the interpretation embodied in the Report disregarded a generally accepted canon of interpretation.[3]

In the case of the *Olympia*[4] the French Prize Council condemned a Greek boat (*felouque*) which had on board seven Turkish soldiers concealed in the hold, together with several boxes of arms, munitions, and other military equipment, a quantity of Turkish gold, and a letter emanating from the Ottoman government—all being destined to hostile ends in the interest of an enemy government.

The captain of the boat alleged that while he was in a Turkish port seven civilians who turned out to be the soldiers in question had invaded his boat and compelled him by threats to obey their orders, but evidence was produced to the satisfaction of the Prize Council that this allegation had no foundation in fact. The suspicion against the captain was further strengthened by the lack of ship's papers and by his concealment of the Turkish

[1] See the list of authorities cited in my *International Law* and the *World War*, Vol. II, p. 369.

[2] M. Fauchille wished to apply the rule to reservists, but when certain members pointed out that it would not be consistent with Article 47 of the Declaration of London he withdrew his proposal.

[3] As pointed out in Sec. 115, *supra*, the Prize Courts of other countries interpreted the Declaration in the light of the General Report.

[4] Fauchille, *Jurispr. Franc.* 123.

militaires. On the basis of Article 45 of the Declaration of London, the *Olympia* with its cargo was condemned as good prize.[1]

In the case of the *Svithiod*[2] the Judicial Committee of the British Privy Council reversed the decision of the Prize Court of Nova Scotia condemning a neutral vessel which while on a voyage from one neutral port to another, took on board, with the connivance of the captain, an enemy stowaway who was a qualified officer in the German merchant marine, there being no evidence that he was carried at the expense of the German government or that he intended to go to Germany. In the course of his opinion Lord Sumner said:

"Their Lordships are, of course, very fully impressed with the great importance of the whole topic of unneutral service, particularly in view of the fact that the change in the circumstances under which maritime warfare is now carried on is so great since most of the cases relied upon were decided. On some proper occasion it might be necessary to define with very great accuracy the way in which well-known principles should be applied under modern conditions; but it is precisely because their Lordships are so impressed with the importance of the subject, with the high obligations which rest upon neutrals to refrain from all unneutral service, and with the gravity of that breach of duty, if it should occur, that they think it unnecessary, and therefore inexpedient and undesirable, to endeavor to decide any question of law in a case where, in their view, the captors have failed to lay any foundation in fact which would justify the investigation of so important a subject."

The Japanese Prize Court at Sasebo refused to condemn a neutral vessel (Norwegian) which while *en route* from Shanghai to the United States carried as a supercargo a German doctor who was an army reserve officer who traveled under a false Swiss name and was returning to Germany to rejoin the army. The Prize Court upheld the validity of the capture because of the irregularity of the ship's papers, because of the presence of the German reservist on board and because the ship had on a previous voyage secretly carried the German minister to China from the United States to Shanghai, under a false name. Nevertheless it ordered the release of the vessel and cargo for the reason that at the time of the trial the reservist had been dead for four months.[3]

[1] See also the case of the *Schooner X* (*ibid.*, 433), where the French Prize Council condemned on the basis of Article 46 of the Declaration of London a vessel carrying no papers but employed by an enemy government (Turkish) for a military end and which transported to an enemy destination a *personnel* instructor and certain war materials.

[2] X Lloyd 1; III Br. & Col. Pr. Cas. 574.

[3] The *Christian Boles*, Feb. 26, 1915. There were also some cases, mostly German, involving the transportation by neutral vessels of freight for belligerent governments under contract. See Verzijl, *op. cit.*, pp. 977 and 987.

There were a number of other instances in which neutral vessels were stopped by belligerent cruisers and persons alleged to be enemy military persons removed therefrom, but the cases were not brought before the Prize Courts.[1]

Sec. 450. Transportation of Refugees from Enemy Port. Case of the "Hanametal." This case, decided by the Supreme Court of Hong Kong (in prize),[2] involved the liability to condemnation of a neutral ship which at the time of capture was proceeding to an enemy port for the purpose of removing therefrom non-combatant refugees of enemy nationality. The *Hanametal* was an American-owned merchant vessel flying the American flag and which, when captured by a British war ship, was on a voyage from Shanghai to Tsingtau with a view to transporting from the latter place a number of German non-combatants. The Crown asked for condemnation of the vessel on the ground that it was proceeding to an enemy port which was liable to be and which was, in fact, subsequently blockaded and that the taking away from such places of a large number of the non-combatant population constituted unneutral service if not actual assistance to the enemy. Oppenheim[3] and Hall[4] were quoted as authority for the proposition that besieging commanders are under no obligation to allow non-combatants to leave besieged places, that in fact they rarely do so because the presence of non-combatants may be a means of insuring an earlier capitulation and that a neutral who assists in the removal of such persons in advance of a siege or blockade renders aid to the one belligerent and injures the other.

Counsel for the claimants, on the other hand, pointed out that the contention of the Crown, if pushed to its logical conclusion, would mean that after the outbreak of war no neutral vessel could transport any passengers from a belligerent port because the port might at some future time be blockaded.

Judge Gompertz, acting chief justice of the Court, rejected the contention of the Crown and denied that either of the text books relied upon, or any reported cases, supported the proposition that the transportation by a neutral ship of non-combatants from a belligerent port constituted unneutral service. The im-

[1] See the cases of Piepenbrink, of Garde and others and the seizures on the *China*, discussed in my *International Law and the World War*, Vol. II, pp. 362-367.

[2] I Br. & Col. Pr. Cas. 347. See also Sec. 189, *supra*.

[3] *International Law*, Vol. II (2d ed.), p. 193.

[4] *International Law* (6th ed.), p. 678.

plication from Article 45 of the Declaration of London which provides for the condemnation of neutral vessels engaged in the transportation of persons embodied in the armed forces of a belligerent, was, he said, that the transportation of non-combatant enemy subjects or of neutrals from an unblockaded enemy port was innocent and unobjectionable. Not every service, he added, which may be beneficial to the enemy is necessarily forbidden to a neutral, for example the transportation of medical supplies to an unblockaded enemy port. He also pointed out that the *Hanametal* had not been engaged by the German government to remove the refugees from Tsingtau; it was a purely neutral undertaking and not inconsistent with the obligations and duties of neutrality.

Among the contentions put forward by the Crown was that the vessel had been under the orders and control of the German government and therefore by the terms of Article 46 of the Declaration of London she was liable to condemnation. It is true that upon arrival at Tsingtau all the European officers aboard (except one), three of whom were British, were replaced by Germans, as no officers of a neutral power could be found and the German authorities would not permit British officers to navigate the vessel through the channel, which was mined. After an examination of the evidence, Judge Gompertz came to the conclusion that the German master was not put on board as agent of the German government and that he acted from first to last in the interests of the neutral owner who never surrendered the control of his vessel to the German government. Finally, the Crown argued that the voyages of the *Hanametal* between Chefoo and Tsingtau which took her very near to Wei-hai Wei, the British naval station used by the British China squadron, were undertaken to gather and convey information to the enemy as to the movements of British war ships and therefore under Article 45 of the Declaration of London she was liable to condemnation. As to this contention the Judge pointed out that at the time the *Hanametal* left Shanghai for Tsingtau the railroad and the telegraph line between the two places were in working order and that if the enemy authorities at the latter place had desired to procure information from Shanghai it could have obtained it by a more expeditious channel than the sea route. His conclusion was that the only direct evidence available showed that the vessel was proceeding on a trading voyage which in itself was perfectly lawful. There may have been room, he said,

for suspicion that the voyage was not entirely innocent; but suspicion was not sufficient to justify condemnation. There must be direct evidence of a positive breach of neutrality and as this was the case of a neutral vessel the burden of producing it was upon the Crown. This had not been done and the vessel must therefore be released.[1]

[1] Compare in this connection the *Paklat*, discussed in Sec. 189, *supra*.

CHAPTER XV

BLOCKADE

I

Regular Blockades

Sec. 451. Importance of Blockade During the World War. In consequence of the fact that all the important maritime States were participants in the late war, blockade, like the measures for the interception of contraband, played an important rôle. It is somewhat singular, however, that Great Britain and France, the two principal belligerents on the one side, did not have recourse to blockade measures against Germany, the principal belligerent on the other side, until after the war had been in progress for some seven months. Until then they contented themselves, in the main, with the employment of their power to prevent contraband goods from going to their chief adversary. Since the category of contraband was extended to embrace nearly all commodities which were capable of serving either the civil or military necessities of the enemy the measures adopted to intercept the transportation of such commodities to enemy country accomplished in large measure the same object for which recourse to blockade is had.

Sec. 452. Departures from the Existing Rules and Practice. When recourse to blockade came to be adopted it took two forms: First, the regular form customarily followed by belligerents in the past and, in the main, applied in accordance with the established rules of international law governing the exercise of the right of blockade; and, second, blockade applied as a measure of reprisal and under a form not in accord with the law or practice of the past. The blockade of Greece, at the time a neutral power, by Great Britain and France for the purposes of coercion may be mentioned as a third exceptional form.

At the outset, all the belligerent powers manifested a disposition to exercise the right of blockade in accordance with the

generally accepted rules of international law, as they are set forth in the Declaration of London (Arts. 1-21), but very soon modifications of these rules, constituting what were regarded by neutrals as grave infringements upon their rights, were introduced by Orders in Council and decrees, issued notably by the governments of Great Britain and France. The modifications consisted in the establishment of new presumptions of the knowledge of the existence of blockade, the extension of the doctrine of continuous voyage to blockade running and, in the case of the United States, the reintroduction of the rule that a vessel which sails with an intent to evade a blockade is liable to capture from the moment she appears on the high seas (Instructions for the Navy, 1917, art. 31).[1]

Sec. 453. Examples of Regular Blockades. During the early months of the war a number of blockades were proclaimed and established in accordance with the conventional and customary rules governing the exercise of the right of blockade. The first of these appears to have been the blockade by Austria-Hungary on August 10, 1914, of the coast of Montenegro.[2] The second was the blockade on August 27, 1914, of certain parts of the coast of Kiau-Chau by Japan.[3] The third was the blockade on February 28, 1915, by Great Britain of the coast of German East Africa and the adjacent islands.[4] The fourth was the blockade on April 23, 1915, by the commander of the naval forces of the allied powers off the west coast of Africa, of certain parts of the coast of the Cameroons.[5] The fifth was the blockade by Italy on May 26, 1915, of the Austro-Hungarian coast extending northward to the coast of Montenegro and southward to certain points, and also the coast of Albania (then neutral,

[1] See especially the British Orders in Council of October 29, 1914, of March 30, 1916, and July 7, 1916; the French "Instructions of January 30, 1910 (Sec. 76), and the decree of April 12, 1916 (Sec. 2) and the Italian Rules of March 25, 1917, Arts. 34-37. The most important departure from the Declaration of London, aside from the new presumptions relative to the knowledge of blockade, which was introduced by these orders and decrees was that the principle of continuous voyage or ultimate destination should be applicable both to the carriage of contraband and of blockade running. Germany, Russia, Japan, and Austria-Hungary, however, do not appear to have introduced this rule, although Germany and Japan introduced new presumptions regarding knowledge of the existence of blockade. Article 79 of the German Prize Code in fact expressly excluded the application of the doctrine of continuous voyage to blockade, and in this respect it was in accord with article 19 of the Declaration of London. The rule embodied in the Austro-Hungarian *Dienstbuch* (Sec. XXI-Ia) was identical with that of the German Prize Code. The American "Instructions" of 1917 conformed in this respect to the Declaration of London.

[2] Text of the blockade proclamation in 22 *Rev. Gén. de Droit Int. Pub.* (1915) *Docs.*, p. 74. [3] Text, *ibid.*, p. 145. [4] *Ibid.*, p. 120.

[5] *Ibid.*, p. 130, and *ibid.*, 1916, pp. 125, 127.

at least nominally) northward to the frontier of Montenegro.[1] In the following month this blockade was extended to embrace the entire Adriatic Sea. The sixth was the blockade on June 2, 1915, by Great Britain (and by France on June 6) of certain parts of the coast of Asia Minor including the entrance to the Dardanelles.[2] The seventh was the blockade on August 25, 1915, by the commander of the allied naval forces in the Mediterranean of the coast of Asia Minor and of Syria from the Isle of Samos to the Egyptian frontier.[3] The eighth was the blockade on October 16, 1915, by the same commander (and by the government of Italy), of the Ægean coast of Bulgaria.[4] Finally, there was the blockade on September 16, 1916, by the same commander, of the coast of Macedonia (Greek territory and therefore neutral, at least nominally), from the mouth of the Struma River to the Greek frontier.[5] There may have been others but if so they are unknown to the author.[6]

The declarations proclaiming all these blockades indicated the date when they would go into effect; they specified the exact limits of the coasts to be blockaded; with the exception of the blockade of the Adriatic they specified the period or *délai* (it ranged from 24 hours to 10 days) during which neutral vessels found in the ports of the blockaded areas at the commencement of the blockade would be allowed to leave, and most, if not all of them, announced that a sufficient number of vessels would be stationed off the blockaded coasts to make the blockade effective.

Sec. 454. Blockade of Neutral States, Albania and Greece. The validity of none of them appears to have been attacked except the Italian blockade of the Adriatic Sea, including the coast of Albania, and the allied blockade of Greece. The Italian blockade of the Adriatic would have prevented access to Italian ports on the Adriatic and to those of Montenegro, a state allied with Italy, but for a system of safe conducts by which trade with those ports was permitted, notwithstanding the blockade. Albania being neutral, at least at the time the blockade was

[1] *Ibid.*, 1915, *Docs.*, pp. 215, 220. Four days later the limits of the blockade of Albania were somewhat contracted.
[2] *Ibid.*, 1915, *Docs.*, p. 216; also *London Gazette*, October 19, 1915.
[3] *Ibid.*, 1916, *Docs.*, p. 1.
[4] *Ibid.*, 1916, *Docs.*, p. 150, and *ibid.*, 1917, p. 165; also 42 Clunet, p. 299.
[5] *Ibid.*, 1917, *Docs.*, p. 53.
[6] The Belgian Prize Commission, in the case of the *Roelfina* (*Moniteur Belge*, Jan. 17, 1920, p. 403), asserted that Great Britain, by a declaration in conformity with the Declaration of London, proclaimed a blockade of the coast of Belgium, then occupied by the German forces, but there appears to be no record of the formal establishment of any such blockade.

established, the validity of the blockade so far as it prevented access to Albanian ports was contested, not however before the Italian Prize Commission, but by the Albanians themselves and by Austrian publicists.[1] The Italian government, on the other hand, defended its validity on the ground that the Austro-Hungarian government made use of certain Albanian ports for the purpose of revictualling the Austrian fleet—a charge which the Austro-Hungarian government, however, formally denied. The situation of this petty state was, however, anomalous at the outset and if it may be considered as having been neutral, its neutrality undoubtedly ceased later on in consequence of its treatment by the belligerents on both sides.

The blockade of Greece, nominally at least a neutral power at the time, by the fleets of Great Britain and France in December, 1916, was defended by the blockading powers on the ground that the Greek government at the time was not observing its obligations of neutrality but was permitting Greek territory and ports to be used as bases of supplies and operations by Germany and Austria-Hungary against the allied powers, that it permitted an extensive German propaganda to be carried on in the country against the allied cause, that it allowed the strongest fortification in Greece to be surrendered to the Bulgarians, that it handed over an army corps of 40,000 men to the Germans for "friendly internment," etc. The purpose of the blockade was to coerce the Greek government into compliance with various demands made upon it by the governments of Great Britain and France. It was therefore analogous to a pacific blockade and not, like the others, directed against an enemy belligerent, although like them it was applied to the ships of neutral powers, which is not recognized as permissible in the case of pacific blockade.[2]

II

Prize Jurisprudence Relative to Blockade

Sec. 455. The Question of Effectiveness. Prize cases involving questions of blockade were relatively rare during the

[1] The *Continental Times* of July 3, 1915, quoted Professor Lammasch as having denied the validity of the blockade and protests were made by groups of Albanians in the United States.

[2] As to the circumstances which led to the establishment of this blockade and the defense put forward by the blockading powers, see my *International Law and the World War*, Vol. II, pp. 241 ff.; see also Ion, "The Hellenic Crisis," in 12 *Amer. Jour. of Int. Law* (1917), pp. 46 ff. and 327 ff., and Recouly, *M. Jonnart en Grèce et l'abdication de Constantin* (Paris, 1918).

World War. The question of the effectiveness of blockade appears to have been directly raised only before the Italian Prize Commission. In a number of cases, most of them involving Greek vessels which sailed from the island of Corfu in the month of June, 1915, and were seized in the *rayon d'action* of the force blockading the Adriatic, by French torpedo boats coöperating with and acting under the orders of the Italian naval forces in the maintenance of the blockade, the claimants contended, *inter alia,* that the blockade which they were charged with attempting to violate was not effective, principally for the reason that it was maintained in part by French warships.[1] The Prize Commission, however, refused to accept this argument. The contention of the claimants, it declared, was ill-founded for the simple reason that since the establishment of the blockade, without interruption, as was attested by the general staff of the army, a sufficient force had been maintained to prevent approach to the blockaded coast. The Prize Commission added that "the non-effectiveness of a blockade cannot be deduced from the circumstance that the seizure of Greek sailing vessels had been made by French vessels, since the latter were coöperating with the Italian forces in the maintenance of the blockade established by Italy and were under the direct and immediate dependence of the Italian military command, whose orders they executed, and the seizures had been made by them for the account of and in the interest of the Italian state.

The Belgian Prize Council in the case of the *Roelfina*[2] expressed at some length its opinion on the question of what constitutes an effective blockade, although the question was not directly involved in the case. The precise question at issue was the validity of the transfer of a vessel lying in the port of Bruges from an enemy to a neutral flag and in order to establish the invalidity of the transfer the Prize Commission maintained that the coast of Belgium then under German occupation was blockaded by Great Britain and that the blockade was effective in the sense of Article 2 of the Declaration of London. The right of a belligerent to blockade the ports and coasts of an allied power under enemy occupation, was, the Prize Commission asserted, recognized by Article 1 of the Declaration of London; that the alleged blockade of Belgium by Great Britain

[1] The *Aghios Spiridon and Other Vessels*, Fauchille et Basdevant, *Jurispr. Ital.*, p. 5; also the *Aghios Caralambos*, *ibid.*, p. 11; the *Aghia Elene*, *ibid.*, p. 17, and the *Posseidon*, *ibid.*, p. 21.

[2] *Moniteur Belge*, Jan. 17, 1920, p. 403.

had been maintained by Great Britain down to the date of the armistice with such effectiveness as to prevent access to or egress from Belgian ports; that it had been done by means of mines which barred access to the North Sea and by numerous cruisers which constantly patrolled the entrance to the North Sea while allied aeroplanes patrolled the Belgian coast day and night; that the English fleet with bases at Dover, Dunkirk, and other places on the English and French coasts had exercised a constant surveillance over the English Channel; that English submarines had aided in the work and that the blockade was so effective that no German vessel had ever attempted to enter or leave a Belgian port.

Sec. 456. The Question of Notification. In two respects the Italian blockade of the Adriatic Sea does not appear to have conformed to the rules of the Declaration of London (Arts. 9-11) in that the proclamation establishing it did not specify the *délai* during which neutral vessels in the blockaded ports would be allowed to leave, nor was notification made to the local authorities by the commander of the blockading forces. In the above mentioned cases of the Greek vessels, which came before the Italian Prize Commission, the claimants relied in part upon the failure of the Italian authorities to observe these rules. But the Prize Commission rejected their arguments on this as on the other points raised. Adverting to the publication in the *Gazzetta Ufficiale* of the declaration of the blockade which prescribed the date of the commencement of the blockade and the geographical limits of the coast blockaded, the Prize Commission added that even if there had been an omission to prescribe the *délai* to be accorded neutral ships to leave the blockaded ports, this could have had no bearing on the question of the effectiveness of the blockade. As to the question of notification to neutral powers in accordance with Article 11 of the Declaration of London the Prize Commission asserted that notice had been given the Greek legation at Rome on the day of the declaration of the blockade. But as to the omission to give notice to the local authorities, the Prize Commission made no pronouncement.

Sec. 457. Knowledge of the Existence of Blockade. Article 15 of the Declaration of London provides that in the absence of proof to the contrary knowledge of the blockade is presumed if the vessel left a neutral port subsequent to the notification of the blockade to the power to which such port belongs, provided that such notification is made in sufficient time. In the

Italian cases referred to above, the claimants alleged, in the third place, that the masters of their vesels were ignorant of the existence of the blockade of the Adriatic, at the time of seizure, and as proof in rebuttal of the presumption laid down by Article 15 of the Declaration of London they produced a declaration of the Greek legation at Rome to the effect that the Italian notification to neutral powers of the blockade had not been published by the Greek authorities in Corfu until some days after the departure of the vessels. They produced also a certificate establishing that the Italian consul general in Corfu had not received instructions forbidding him to visé permits for Adriatic ports until after the vessels had sailed. The Prize Commission, however, held that these documents did not establish the contrary proof contemplated by the Declaration of London. As to the allegation that the Italian notification had been tardily published in Corfu, that merited no consideration, first, because it was nothing but a simple affirmation, and, second, because even if it were true it did not follow that the vessels were not cognizant from other sources of the existence of the blockade. The presumption of knowledge therefore must be maintained and nothing but clear and precise proof was sufficient to rebut it. Furthermore, the fact of the proximity of Corfu to the blockade line and the continuity of relations between the inhabitants of the two countries refuted the allegation of ignorance. Again, the certificate referred to above deserved no consideration for the reason that according to the Declaration of London, the contrary proof contemplated had reference to ignorance resulting either from acts imputable to the nation establishing the blockade, such as a defective declaration of blockade or an irregular notification, or from accidental acts special to ships and not ignorance resulting from acts of negligence on the part of the ships themselves or from acts of inexecution imputable to the authorities of the state upon which was incumbent the duty of advising the local authorities of its ports of the declaration of blockade. If ignorance existed in these cases it must be imputed to the negligence of the Greek authorities in Corfu and could therefore have no legal effect as against and at the expense of Italy. As to the certificate relative to the *visé* of permits for Adriatic ports that too had no effect upon the question of ignorance concerning the blockade or the good faith of the ships, since such patents were merely for sanitary purposes. Finally, a further consideration which strengthened the presumption of an intention to violate the

blockade was the fact that one of the vessels resisted seizure; others lacked proper papers; in some cases the papers were irregular and all of the vessels carried cargoes of conditional contraband. Both the ships and their cargoes were accordingly condemned as lawful prize. The only other case involving the question of the ignorance of blockade appears to have been that of the *Fiore del Mare*,[1] decided by the Austro-Hungarian Prize Court. This was a neutral vessel laden with conditional contraband and when seized was in Montenegrin waters *en route* for the port of Antivari. The vessel was also charged with violation of the Austrian blockade of Montenegro. The claimants pleaded ignorance of the existence of the blockade, but the Prize Court rejected the plea. Knowledge of the blockade must be presumed, it said, because it had been proclaimed on August 10, 1914, and on the same day notice of it was communuicated to neutral powers and to the local authorities at Dulcigno and Antivari, whereas the seizure of the vessel did not take place until November 28, 1914, three months and eighteen days thereafter. Proof to the contrary was not made, at least not to the satisfaction of the Court, and the vessel was therefore condemned.

Sec. 458. Violations of Blockade. French Decisions. In a goodly number of cases the prize tribunals of Italy and France were called upon to determine the validity or invalidity of the seizure of vessels, usually Greek, charged with intention of violating blockades established by their governments. The Italian seizures were all of vessels arrested for violating the blockade of the Adriatic; those seized by the French were charged with violating the blockade of Asia Minor and Syria.

In the case of the *Aghios-Nicolaos*,[2] the French Prize Council declined to condemn a small Greek vessel seized in the vicinity of the blockaded zone of Asia Minor, for the reason that no proof was produced to show that the vessel was intending to violate the blockade. At the time of seizure the vessel was near the strait of Samos and the declaration of blockade did not apply to the island of Samos. The same conclusion was reached in the case of the *San Nicolo*,[3] a small Greek vessel which had been seized in the roadstead of Port Vromo within the blockaded zone but which had on board no cargo and there being nothing to indicate that it had attempted to violate the blockade or had any intention of so attempting. The same decision was pronounced in the case of

[1] *Normalverordnungsblaat für die K. u. K. Kriegsmarine* (*Stück*, XII, 1915, p. 59).
[2] Fauchille, *Jurispr. Franc.* 248. [3] *Ibid.*, 250.

a small boat seized in the strait of Samos within the blockaded zone but which carried no cargo, there being nothing in the ship's papers or in the circumstances of its voyage to indicate an intention to violate the blockade.[1] But in the case of the *Evangelistria*[2] the Prize Council condemned a Greek vessel seized in the strait of Samos within the blockaded zone in close proximity to the Turkish coast and which carried a cargo of fish and was engaged in the traffic of supplying fish to the towns on the coast of Asia Minor in violation of the blockade, of the existence of which the master had full knowledge. The same decision was reached in the case of a Turkish vessel captured near the coast of Syria in the blockaded zone, which was being employed by the Turkish government for the revictualment of blockaded boats.[3]

Sec. 459. The Same. Italian Decisions. Most of the cases which came before the Italian Prize Commissions involved the liability to capture of vessels which were seized while entering or attempting to enter the Adriatic Sea without the safe conducts required by the declaration of blockade. In the case of the *Pericles*,[4] the Prize Commission declared invalid the seizure of a Greek vessel destined to Valona with a cargo of salt consigned by the consul general of Montenegro to a representative of the Montenegrin government at Valona. The ship had neglected to touch at Gallipoli to obtain a safe conduct, because of bad weather and because of injuries which it had sustained. The Commission held that this was a case of *force majeure* and although the vessel had passed the blockading line without a safe conduct, under the circumstances it could not be considered as having wilfully violated the blockade.

But in the case of the *Evangelistria*,[5] the Prize Commission condemned a Greek vessel bound for Durazzo with a cargo destined to Montenegro (a state allied with Italy) but which had no safe conduct. The Commisison held that the obligation to obtain a safe conduct to pass the blockade was not satisfied by a ship which had made prior to this voyage *démarches* before other authorities than those required by the decree of blockade, in order to obtain free passage in the Adriatic. The fact that no intention on the part of the vessel to trade with enemy blockaded

[1] *Embarcation X*, *ibid.*, 252. [3] *Ibid.*, 424.
[2] The *Mabrouke*, *ibid.*, 494. See also the case of the *Jabr-el-Khaouater* (27 *Rev. Gén., Jurispr.* 13), where a Turkish vessel was condemned for navigating in the blockaded zone.
[4] Fauchille et Basdevant, *Jurispr. Ital.* 152. [5] *Ibid.*, 172.

ports in the Adriatic was shown and that the cargo was destined to the allied Montenegrin port of Durazzo was not sufficient to establish innocence. The simple fact that the vessel was without the safe conduct required and which could have been obtained from the Italian authorities at Gallipoli, was decisive as to the violation of the blockade.

In the case of the *Mikail*[1] and the *Anthippi*,[2] the Prize Commission condemned two Greek vessels carrying cargoes of foodstuffs for the government of Montenegro to San Giovanni di Medua and which were furnished with proper safe conducts but the conditions of which were not strictly observed by the masters of the vessels. The particular offence consisted in the failure to discharge a part of their cargoes at Valona and obtain orders from the military authorities there to continue their voyage to the port of destination.

III

Irregular or So-Called Blockades

Sec. 460. The German Submarine "Blockade" of the British Isles. The German decree of February 4, 1915, proclaiming the waters surrounding Great Britain and Ireland, including the whole North Sea, to be a theater of war (*Kriegsgebiete*) and announcing that after February 18 all enemy merchant vessels encountered in this zone would if possible be destroyed; and the decree of January 31, 1917, proclaiming a war zone (*Sperrgebiete*) around Great Britain, France, and Italy, and in certain parts of the Mediterranean Sea and within which it was announced that "all sea traffic" was to be forthwith prevented by means of mines and submarines," subject to certain exceptions, were frequently referred to as blockade measures, although the first one at least does not appear to have been so intended by the German government.[3]

[1] *Ibid.*, 216. [2] *Ibid.*, 207.

[3] As to the details relative to these zones see my *International Law and the World War*, Vol. I, pp. 334-339. The measure proclaimed by the decree of February 4, 1915, was frequently referred to in the British diplomatic correspondence as a blockade. See also Parmelee, *Blockade and Sea Power*, p. 9, who remarks that "Germany declared a blockade of Great Britain which it attempted to make effective by means of submarine warcraft." The second decree was even more frequently characterized as a "blockade" measure. See, for example, a communication of Dr. Paul Ritter, Swiss Minister at Washington, to the American government, March 23, 1917. Both decrees are characterized as "blockades" by Villeneuve—Trans. in his book, *La Liberté des Mers, le Blocus de l'Allemande*, ch. III.

German jurists themselves denied that the first decree was a blockade measure since there was no intention of interdicting neutral ships from entering British ports.[1]

The second measure, however, was directed against all neutral trade and countries to which it applied. But if they were intended to be regarded as blockades they did not conform to the established rules or practice, since no adequate naval forces were placed off the blockaded coasts to make the blockade effective. The fact that almost the usual number of neutral vessels continued to enter and leave British ports after the German measures were proclaimed and put into effect was evidence that the German "blockade," if such it was intended to be, lacked the essential quality of effectiveness. As to whether a lawful blockade can be maintained by submarines there is much doubt.[2]

The question as to the legality of the German decrees was never passed upon by the German Prize Court, it having denied that the Prize Courts had jurisdiction of cases of seizure or destruction of vessels in the barred zones.[3]

Sec. 461. The Anglo-French "Blockade" of Germany. As stated above, the war had been in progress some seven months before Great Britain and France had recourse to blockade as a means of intercepting trade with Germany. Until then recourse was had to the belligerent right to intercept contraband, other goods being allowed to go to Germany. On March 1, 1915, however, the British government announced that the allied governments had decided "to seize all ships carrying goods of presumed enemy destination, ownership, or origin." This decision was avowedly a retaliatory measure against Germany for her war zone measure of February 4, 1915, which was declared to be

[1] Heilbronn, *Zeitschrift für Völkerrecht*, Vol. IX, p. 58. Baty (10 *Amer. Jour. of Int. Law*, 50) declares that the German war zone measures were no blockade because they were "hopelessly ineffective." They were, he says, not intended to be a blockade but an attempt to secure the benefits for blockade in another way.

[2] Fauchille, 25 *Rev. Gén. de Droit Int.*, p. 79, maintains that it cannot. Villeneuve—Trans. (*op. cit.*, p. 40) thinks the blockade of the British Isles and the coast of France would not have been "criticizable" if the number of submarines employed to enforce it had been sufficient to make it effective and if the safety of the lives of passengers on board neutral ships destroyed by the submarines had been safeguarded. Compare also Pchedecki, *Le Droit Int. Maritime et la Grande Guerre* (p. 198), who apparently thinks it possible to maintain an effective blockade by means of submarines. The Latin-American jurist, Alesandri, in his book, *Contribution à l'Étude des Blocus Nouveaux* (Paris, 1919), apparently thinks that blockades by submarines will have to be recognized, and that the old rule as to effectiveness will have to be modified so as to make such blockades legal.

[3] See, among others, the cases of the *Eemland* and *Gaasterland*, I *Entsch.* 388; Fauchille et De Visscher, *Jurispr. All.* 296; also the *Geertrudia* (*ibid.*, 302; *ibid.*, 228).

wholly outside the domain of international law. The word "blockade" however, was not employed in the British announcement. "In the retaliatory measures we propose to adopt," said the Prime Minister in announcing the decision, "blockade, contraband, and other technical terms do not occur, and advisedly, in dealing with an opponent who has openly repudiated all the restraints of law and humanity, we are not going to allow our efforts to be strangled in a network of juridical meshes." By an Order in Council of March 11, the measure announced on March 1 was put into effect. By it no merchant vessel which had sailed from her port of departure after March 1 for any German port would be allowed to proceed without a pass. In case the goods seized on such vessel were non-contraband of war they would be restored under such conditions as the Prize Court might deem just. The same treatment was to be applied to merchant vessels which sailed from German ports after March 1.[1] The effect would therefore be that of a blockade, though not proclaimed as such and though not possessing the technical characteristics of the usual form of blockade. It differed in substance, however, from blockade in the usual sense in that non-contraband goods were not to be confiscated; it was therefore more favorable to neutrals than the customary blockades of the past, under which all goods, whether contraband or not, were liable to confiscation with the ship when destined to a blockaded port. Though not possessing the form or technique of a blockade in the usual sense the British authorities frankly admitted that its purpose was to establish a blockade of all commerce with Germany.[2]

The promulgation of the British Order in Council (and the French decree of March 13, putting into effect the same measure) immediately provoked protest on the part of neutral governments. The American Secretary of State characterized the measure as a "so-called" blockade and declared that it was illegal

[1] Texts of the British Order in Council and the French decree may be found in the *Spec Supp.* to 9 *Amer. Jour.*, pp. 109-110. I have discussed with some detail the character of the Anglo-French "blockade" in my *Int. Law and the World War*, Vol. II, pp. 319 ff.

[2] Compare the following statement from a memorandum of the British Foreign Office placed in the hands of the American Ambassador to London, on March 13, 1915: "The government of Great Britain have frankly declared, in concert with the government of France, their intention to meet the German attempt to stop all supplies of every kind from leaving or entering British or French ports by themselves stopping supplies going to or from Germany for this end. The British fleet has instituted a *blockade*, effectively controlling by cruiser 'cordon' all passage to and from Germany by sea."

because it constituted a virtual blockade of the ports of neutral countries adjacent to Germany. It was declared to be illegal, furthermore, because it did not apply impartially to the ships of all nations, since no intention had been announced of intercepting traffic between Scandinavian ports and German ports on the Baltic.[1] In reply to the protests of neutral powers, Sir Edward Grey stated that the British government was unable to accept the contention that if a belligerent is so circumstanced that his commerce can pass through adjacent neutral ports as easily as through his own ports, his opponent has no right to interfere with such trade and must restrict his measures of blockade in such a way as to leave such channels of commerce open to the enemy. On this point, he said:

"Adjacent to Germany are various neutral countries which afford her convenient opportunities for carrying on her trade with foreign countries. Her own territories are covered by a network of railways and waterways, which enable her commerce to pass as conveniently through ports in such neutral countries as through her own. A blockade limited to enemy ports would leave open routes by which every kind of German commerce could pass almost as easily as through the ports in her own country. Rotterdam is indeed the nearest outlet for some of the industrial districts of Germany."

Such a contention, he said, could not be sustained upon principles either of international law or equity. He added that the British government was unable

"to admit that a belligerent violates any fundamental principle of international law by applying a blockade in such a way as to cut off the enemy's commerce with foreign countries through neutral ports if the circumstances render such an application of the principles of blockade the only means of making it effective. The Government of the United States indeed intimates its readiness to take into account 'the great changes which have occurred in the conditions and means of naval warfare since the rules hitherto governing legal blockade were formulated,' and recognizes that the form of close blockade with its cordon of ships in the immediate offing of blockaded ports is no longer practicable in the face of an enemy possessing the means and opportunity to make an effective defense by the use of submarines, mines, and aircraft."

And he continued:

"What is really important in the general interest is that adaptations of the old rules should not be made unless they are consistent with the general principles upon which an admitted belligerent right is based. It is also essential that all unnecessary injury to neutrals should be avoided. With these conditions it may be safely affirmed that the steps we are taking

[1] See especially the American Notes of March 30, 1915, and of October 21, 1915, *Spec. Supp.* to 9 *Amer. Jour.*, p. 117, and 10, *ibid.*, 73.

to intercept commodities on their way to and from Germany fully comply. We are interfering with no goods in which we should not be entitled to interfere by blockade if the geographical position and the conditions of Germany at present were such that her commerce passed through her own ports. We are taking the utmost possible care not to interfere with commerce genuinely destined for or proceeding from neutral countries. Furthermore, we have tempered the severity with which our measures might press upon neutrals by not applying the rule which was invariable in the old form of blockade that ships and goods on their way to or from the blockaded area are liable to condemnation."[1]

Sec. 462. Validity of Anglo-French "Blockade" Sustained by Prize Courts. The only British case in which the character of the Anglo-French "blockade" of Germany was discussed was that of the *Leonora*.[2] After stating the general principles of the law of blockade and reviewing the history of the attitude of the American government on the subject during the Civil War, Sir Samuel Evans said:

"It is, of course, true that, according to the existing rules of international law, there can be no blockade of neutral ports or coast lines. The Order in Council does not purport to declare a blockade of the ports to which it applies in the strict sense in which that term is used in international law. But the object at which it aimed as regards the enemy is similar. In saying this, I am not suggesting that the method adopted by the Order in Council has been accepted by the nations in such a way that it already forms part of the established law. That some change will evolve upon this subject, in view of the kinds of weapons now used on and under the sea, and in the air, seems certain. Meantime, can it be said that what the Order in Council prescribes is in any essential principle different from a blockade? It is not on the lines of a blockade, by whatever name it may be called? It is not a blockade of enemy ports; but it is a stoppage or *quasi*-blockade at the enemy's maritime trade through adjacent ports."

Sir Samuel evidently considered it to be in effect if not in form a blockade, but whatever it was, the Order in Council establishing it was justified under the law of nations, as a legitimate measure of retaliation, and did not entail on neutrals an unreasonable degree of inconvenience, considering all the circumstances which led to the promulgation of the order.

The French Prize Council in the case of the *Almazora*,[3] adverting to the provision in the armistice of November 11, 1918, with Germany to the effect that the "existing blockade" of Germany should be continued, remarked that "during the war, without

[1] See especially Sir Edward Grey's note of July 23, 1915, *ibid.*, Vol. 9, p. 157, and his memorandum accompanying a note to Mr. Page in April, 1916, *ibid.*, Vol. 10, pp. 134 ff.
[2] VII Lloyd 262; III Br. & Col. Pr. Cas. 181.
[3] 27 *Rev. Gén.* (1920), *Jurispr.* 72.

pronouncing a blockade, in the precise sense of the term, of any of the German coasts, the allies had prevented (*mis obstacle à*) exportations to and importations from Germany and that it is in this sense that the maintenance of the blockade mentioned in the armistice convention must be understood."

Sec. 463. Observations on the Legality of the Anglo-French "Blockade." Regarding the legality of the "so-called blockade" of Germany by Great Britain and France, there has been much controversy and opinions will naturally differ as to its validity. As to its form it undoubtedly was not in conformity with the rules and practice of the past. It was never formally proclaimed as a blockade; nothing was said as to the geographical limits of the enemy coast to which it was to be applied and nothing as to the *délai* to be accorded neutral vessels, within which they would be allowed to depart. On the other hand, it was a peculiar species of blockade, in that non-contraband goods on offending vessels were not to be confiscated as they are when seized on vessels guilty of violating a regular blockade. Regarding the requirement as to effectiveness, it may be stated that the British government announced at the outset that the "British fleet had instituted a *blockade* effectively controlling by cruiser 'cordon' all passage to and from Germany by sea," and the results leave little doubt that in fact it was quite as effective as most of the blockades of the past. During the diplomatic discussion between the British and American governments on the subject, the latter admitted that on account of the great changes that had taken place in the conditions and methods of naval warfare it was no longer practicable to insist upon the observance of the old rule that a blockade to be legal must be maintained by a cordon of ships stationed in the immediate offing of the blockaded port. It would seem that the criticism, so far as it related to the mere form and technique of the "blockade," was not conclusive. The complaint, however, that the Anglo-French measure amounted in effect to a blockade of the ports of neutral countries adjacent to Germany and that the measure avowedly adopted as a reprisal against Germany amounted to retaliation against neutrals, if that were possible, was more serious. On the basis of existing rules and the practice of the past such a blockade was clearly not permissible. Nevertheless, the situation which confronted Great Britain and France during the war was different from that under which blockades had been resorted to in the past. As Sir Edward Grey pointed

out in his note to the American government, a blockade limited strictly to German ports during the late war would have had little effect as long as adjacent neutral ports were left open and through which unlimited supplies from over the seas could reach Germany as easily as through her own ports. If it be admitted that a belligerent has a legitimate right to prevent by means of a blockade the transportation by sea of supplies direct to the ports of his enemy, it would seem that his right to intercept the same supplies from reaching the enemy indirectly through neighboring neutral ports will have to be admitted, otherwise the belligerent right of blockade under modern conditions will be of little value except where applied to a purely insular state. The attempt which has been made to draw a distinction between the rules applicable to contraband and blockade, allowing the extension of the doctrine of continuous voyage or ultimate destination in the former case and denying it in the latter is lacking in logic and reason and is hardly likely to be maintained in the future. If the right of a belligerent to seize contraband destined for the use of his enemy cannot be defeated by sending through the intermediate channel of a neutral port, there would seem to be no logical reason why his admitted right to prevent by means of a blockade the transportation of non-contraband goods to the same destination, should be allowed to be defeated by the same device.[1]

[1] Compare, to the same effect, Malkin, "Blockade in Modern Conditions." *Br. Yr. Bk. of Int. Law*, 1922-23, pp. 87 ff.; Sir John MacDonnell, *Pubs. of the Grotius Society*, Vol. I, p. 101; Montmorency, *ibid.*, Vol. II, p. 29; Sir Gilbert Murray, *Great Britain's Sea Policy*, p. 17; and Sir Erle Richards, *International Law: Some Problems of the War*, p. 10. Pchedecki (*op. cit.*, p. 184) apparently condemns the extension of the doctrine of continuous voyage to blockade. Compare also Holtzoff, "Some Phases of the Law of Blockade," 10 *Amer. Jour.* (1916), p. 62, who distinguishes between the case where both laps of the voyage are by sea and where the first is by sea and the second by land. In the latter case he thinks there is no offense in shipping goods by sea to a neutral port with the intention of trans-shipping them there and forwarding them by land to a blockaded port. Compare to a similar effect Perrinjacquet (*Rev. Gén. de Dr. Int.*, 1915, pp. 225 ff.), who maintains that the doctrine of continuous voyage can be applied to blockade only where both voyages are by sea. Consequently goods on a ship destined during the late war from the United States (while still neutral) to Rotterdam to be there reforwarded to Germany could not be intercepted by a blockade. But see the observations of Sir Edward Grey on this contention, in his memorandum of April, 1916, referred to above, where he stated that "if the right to intercept commerce on its way to or from a belligerent country, even though it may enter country through a neutral port, be granted, it is difficult to see why the interposition of a few miles of sea as well should make any difference." He added: "It must be remembered that the passage of commerce to a blockaded area across a land frontier or across an inland sea has never been held to interfere with the effectiveness of the blockade."

I have discussed the whole question more at length in my work cited, Vol. II, pp. 327.

CHAPTER XVI

INDEMNITIES AND DAMAGES

I

National and International Regulations

Sec. 464. Rules of the Declaration of London. The belligerent right of capture, detention and of destruction (in exceptional cases) is limited by the obligation of the captor to make compensation for the losses sustained by interested neutral parties resulting from the illegal exercise of the right. This has long been a settled rule of English prize law,[1] although the obligation had not until recently been definitely and generally admitted by Continental powers.[2] The obligation was formally embodied in Article 64 of the Declaration of London which provides that "if the capture of a vessel or of goods is not upheld by the Prize Court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods." The right of compensation here affirmed has reference however only to *neutral* ships and goods and not to those of enemy character. It will be noted also that it is not absolute, for while the vessel or goods may be released by the Prize Court, there may have been justifiable reasons for the seizure in which case there is no obligation to indemnify the owners.

Likewise, the Declaration of London while recognizing the right of a belligerent to destroy in certain exceptional cases a neutral vessel[3] makes it obligatory upon the captor whose commander resorts to such a procedure to make compensation to the interested parties in case he is unable prior to a decision of the Prize Court respecting the validity of the destruction, to establish that he acted "in the face of an exceptional necessity"; specifically, he must show that the taking of the vessel in for prize

[1] The *Ostee*. 9 Moo. P. C. 150; the *Leucade*, Spinks. 21.
[2] Compare Bentwich, *The Declaration of London*, 122. [3] Articles 48-50.

adjudication would have involved danger to his own warship or to the "success of the operations in which she was engaged at the time."[1] If subsequent to the destruction, the Prize Court holds that the capture was invalid, though the act of destruction has been held to have been justifiable, the captor is required to make compensation in the place of the restitution to which the interested parties would have been entitled.[2]

According to these rules the onus is on the captor to establish to the satisfaction of the Prize Court the existence of the exceptional necessity which prevented him from taking the ship into port for prize adjudication. It is not sufficient for him to prove the validity of the capture by showing that the goods were contraband or that the vessel was endeavoring to enter a blockaded port or was engaged in unneutral service; he must prove that the destruction of the ship was an act of necessity to avoid danger to his own warship or to the success of his naval operations. On the other hand, it is not sufficient for him to establish the existence of this necessity; he must prove, in addition, that the vessel was liable to capture and condemnation. In both cases if he fails to discharge this burden he is bound to make compensation to the interested parties.

Finally, if neutral *goods* not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.[3] This means innocent goods on a *neutral* ship the destruction of which has been held by the Prize Court to have been justifiable. As to innocent neutral goods on an *enemy* ship, the Declaration of London apparently is not applicable. France refused to make compensation in such cases during the war of 1870-71. But the obligation to make compensation for the destruction of innocent neutral property on a *neutral* ship legally sunk will probably strengthen the view that compensation should be made equally when they are destroyed in consequence of the sinking of an *enemy* prize.[4]

[1] Articles 49, 51. [2] Article 52.

[3] Article 53. By Article 54 the captor is allowed to demand the handing over, or to proceed himself to the destruction of any goods liable to condemnation, found on a vessel not herself liable to condemnation, provided there exists the exceptional necessity which would justify the destruction of a vessel herself liable to condemnation. This is a new rule, the purpose of which was to limit as far as possible belligerent interference with neutral trade when the taking of the prize in for adjudication would involve great hardship to the neutral and result in little advantage to the belligerent.

[4] Compare Bentwich, *op. cit.*, p. 100. The Italian Rules of 1917, relative to the right of capture, unlike those of other countries, in fact provide that the owner of innocent neutral goods on an *enemy* vessel which has been destroyed is entitled to compensation equally with the owner of those on a *neutral* vessel (Article 100).

Sec. 465. National Prize Regulations. The above mentioned rules were found literally or in modified form in the prize regulations of a number of the belligerent powers at the outbreak of the World War. The German prize code (Art. 8) reproduces literally Article 64 of the Declaration of London but it adds that sufficient grounds justifying the capture of the vessel or goods shall be deemed to exist where there has been destruction or removal of the ship's papers or where the papers are found to be false, and where the latter irregularity is of importance in connection with the capture or release of the vessel. The Articles of the Declaration of London relative to the destruction of neutral prizes and the obligation to make compensation therefor, in certain circumstances, are, in substance, reproduced in Articles 113-115 of the German prize code, but in addition there is an enumeration of certain circumstances which are deemed to create a presumption that the taking of the ship in would involve danger to the captor's warships or impede the operations in which he was at the time engaged. Such are the defective condition of the captured vessel or its insufficiency of supplies, its liability to follow the captor vessel, the proximity of enemy forces and the inability of the captor to spare an adequate prize crew from his own vessel with which to conduct the prize in to a home port. The British government refused to admit the validity of some of these justifications.

The German prize code also expressly affirmed that the seizure of a vessel which had been transferred to a neutral flag under suspicious circumstances, and especially if the bill of sale was not on board, could never give rise to a claim for damages.[1] The Declaration of London is silent on this question.

The Italian prize rules of 1917, so far as they relate to compensation for the illegal destruction of neutral ships or goods, correspond in substance to those of the Declaration of London, except that Article 100 (as stated above) extends the obligation in respect to compensation to apply to the case of innocent neutral goods on *enemy* as well as on *neutral* ships destroyed. The American "Instructions for the Navy, 1917" reproduce in substance Article 64 of the Declaration of London with the additional statement that "an officer making a capture is held by the courts of the United States to be personally liable in damages, unless the capture made by him is for probable cause."[2] They add further that:

[1] Articles 13-14.

[2] Article 78.

"Probable cause is defined by the Supreme Court of the United States as follows: Probable cause exists where there are circumstances sufficient to warrant suspicion, though it may turn out that the facts are not sufficient to warrant condemnation. And whether they are or not can not be determined unless the customary proceedings of prize are instituted and enforced. (Per Chief Justice Fuller in *Olinde Rodriguez*, 174 U. S., 510, 1899). . . . The term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. (Per Chief Justice Marshall in *Locke* v. *U. S.*, 7 Cranch 339, 1813)."[1]

The French "Instructions" (revision of 1916) reproduce the provisions of the Declaration of London relative to the exceptional circumstances under which neutral prizes may be destroyed, but not those respecting the obligation of the captor to make compensation in case the existence of exceptional necessity justifying the destruction is not established. This omission was doubtless due to the fact that the French regulations are in the nature of instructions addressed to naval commanders for their guidance rather than general rules governing the exercise of the right of capture. Consequently there was no place to lay down rules as to the responsibility of the state for damages resulting from the non-observance by naval commanders of the instructions addressed to them. Nevertheless, it is laid down that the failure of naval commanders to observe certain enumerated formalities in destroying prizes will entail the responsibility of the captor[2] but this was probably not intended to mean personal liability for damages, on the part of the commander, as the American instructions prescribe.

The Austro-Hungarian, Japanese, Roumanian, Russian, and Turkish regulations, however, specifically affirm the obligation to make compensation in case of illegal captures or destructions, although the Turkish regulations add that no claim will be received unless it is established that the captor was guilty of grave fault.

II

Damages for Seizure or Detention of Ships and Goods

Sec. 466. No Damages Allowed Where Justifiable Reasons for Seizure Existed. British Decisions. A neutral (or allied) vessel may be seized and taken into port on suspicion

[1] Article 79.

[2] Article 160.

that the ship is engaged in transporting contraband or is bound for a blockaded port, or is engaged in unneutral service, or has been unlawfully transferred from an enemy flag, but which may be released by the Prize Court. The owners of the ship or the goods, or both, may claim damages on the ground that there were not justifiable reasons for the seizure and detention or that the ship or goods were by international law exempt from seizure. A large number of such cases came before the Prize Courts during the late war and the decisions reached in each country were based mainly on the provisions of national prize regulations or upon the traditional rules of prize law enunciated by their Prize Courts in earlier wars.

In the case of the *Kronprins Gustaf Adolf and Other Vessels*,[1] Sir Samuel Evans refused to award damages and costs for the seizure of certain goods on neutral vessels, which were released to the claimants, for the reason that the circumstances were sufficient to establish "probable cause" justifying the seizure; but he allowed compensation for the unnecessary delay which was involved in having the goods released. Restitution of a ship or cargo, he said, might be attended by any one of the following circumstances:

"First, the claimants may be ordered to pay to the captors their costs and expenses; or secondly, the restitution may be simple restitution, without costs or expenses, or damages to either party; or thirdly, the captors may be ordered to pay costs and damages to the claimants—*vide* the *Ostsee* (1855), (9 Moore P. C. 150; Spinks, 174; 2 Eng. P. C. 432)".

The "cardinal question" in each case, he added, is whether there was "probable cause" justifying the capture. The law, he said, was thus stated by Mr. Justice Story: [2]

"Every capture, whether made by commissioned or non-commissioned ships, is at the peril of the captors. If they capture property without reasonable or justifiable cause, they are liable to a suit for restitution, and may also be mulcted in costs and damages. If the vessel and cargo, or any part thereof, be good prize, they are completely justified. And although the whole property may, upon a hearing, be restored; yet, if there was probable cause of capture they are not responsible in damages."

He also quoted from a decision of the same learned judge in the case of the *George* [3] to the effect that "reasonable suspicion"

[1] VI Lloyd 245; II Br. & Col. Pr. Cas. 418.
[2] *Principles and Practice of Prize Courts* (Pratt's ed., 35).
[3] I Mason 24 (1815).

as to illegal traffic or "reasonable doubt" as to ownership, native character or the legality of the conduct of the parties, justifies capture, although the Prize Court may release the ship without the formality of further proof. This statement he said was approved by the Judicial Committee in the case of the *Ostsee* (*supra*), and it applied equally to both ships and cargoes. He concluded that "it is obvious that what amounts to probable cause so as to justify a capture is incapable of precise definition; it must be ascertained by the Court according to the circumstances of each particular case.

This view was approved by the Judicial Committee in the case of the *Baron Stjernblad*,[1] where the Prize Court had refused to allow any costs or damages for the seizure on suspicion of an ultimate enemy destination, of goods on a neutral ship and consigned to a neutral port, but which had been released by the Prize Court. The grounds of suspicion were held to be reasonable enough to justify the seizure. Lord Parker, speaking for the Judicial Committee, said that the law on the subject was "reasonably certain," it having been stated in the letter of Sir William Scott and Sir John Nicholl in 1794 [2] and in the decision in the case of the *Ostsee*. Lord Parker himself thus restated the rule:

"If there were no circumstance of suspicion, or, as it is sometimes put, 'no probable cause,' justifying the seizure, the claimant to whom the goods are released is entitled to both costs and damages. If, on the other hand, there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages. The reason is clear. It would be obviously unjust to compel a belligerent to pay damages or costs where he has done nothing in excess of his belligerent rights, and those rights justify a seizure of neutral property when it is in nature contraband and there is reasonable suspicion that it has an enemy destination. This may be thought hard upon the neutral owner, who will not be fully indemnified by a mere release of his property. So it is; but war unfortunately entails hardships of various kinds on neutrals, as well as on belligerents. It follows that the real question to be decided on this appeal is whether, when the goods were seized, there were circumstances of suspicion justifying the seizure."

An incidental question was raised in this case by the contention of the claimants that in determining whether there were circumstances of suspicion which were sufficient to justify seizure, the Prize Court must confine its consideration to those circumstances for which the owner of the property seized is in some way responsible, and not those the existence of which is

[1] VI Lloyd 99; III Br. & Col. Pr. Cas. 17.
[2] Printed in Story's work, cited above, pp. 1-11.

not due to any act or omission on the part of the owner or his representatives. After a recital of the circumstances under which the seizure in question was made, and which "amply justified the seizure," Lord Parker said their Lordships were of the opinion that the contention of the appellants was "wholly untenable." "The question in every case," he said, "is whether circumstances of suspicion exist, and not who is responsible for their existence."

In the case of the *Pacific* and *San Francisco*,[1] Sir Samuel Evans released a quantity of dried fruit seized in transit from America to Sweden and consigned to the Swedish Victualling Commission, on the ground that he was satisfied that the goods were intended *bona fide* for consumption in Sweden and that the commission was doing its best to prevent re-exportation to Germany. But he refused to allow the claimants anything in the way of compensation, costs, or expenses because, owing to the fact that large quantities of such commodities had previously been imported into Sweden and re-exported to Germany, there were reasonable grounds justifying the seizure.

In the case of the *Bonna and Other Vessels*,[2] where a quantity of cocoanut oil (conditional contraband) consigned to Swedish ports was released, Sir Samuel Evans refused to allow claims for damages and costs for the detention of the goods for the reason that Gothenburg, the port of discharge for the goods, was "a very convenient port, and a port which had been very greatly used for the purpose of transmitting goods from foreign countries into Germany"; consequently, although he held that the goods were not destined for Germany, this and other circumstances constituted "a full justification for the seizure and detention."

In the case of the *Falk and Other Vessels*,[3] the Prize Court refused to allow damages on account of the seizure and detention on suspicion of contraband goods consigned to the ports of a neutral country (Sweden) when the Procurator-General decided after inquiry not to claim condemnation of the goods. There had been considerable delay in releasing the goods and the Judicial Committee, on appeal, admitted that the claimants had suffered a loss which was "regrettable and large," some four years having elapsed between the seizure and the judgment, and the costs had been heavy. The claimants contended that the loss which they had sustained was due to the unlawful seizure of the goods by the Procurator-General and his negligence or inaction

[1] VII Lloyd 75. [2] VII Lloyd 367; III Br. & Col. Pr. Cas. 163.
[3] X, *ibid.*, 25; III, *ibid.*, 955.

in releasing them, and that he was liable in damages therefor. But Sir Henry Duke held that he was not liable and the judgment was affirmed by the Judicial Committee. The original seizure was held to have been justifiable for the reason that the goods were contraband of a kind often and largely sent on a continuous transit from the United States through Sweden to Germany where they were scarce and dear; in short, there was "probable cause" for a judicial inquiry with a view to condemnation, although it subsequently became evident that they were not liable to condemnation. As to the claimant's contention based on the action or inaction of the Procurator-General, the Judicial Committee held that his delay was not due to negligence, deliberate procrastination or bad faith, but was reasonably necessary. As to the nature of the suspicion which is sufficient to justify seizure and hence for the rejection of claims for damages, Lord Sumner said:

"The foundation of the right, variously expressed in different cases, may be said to be the existence of reasonable suspicion, it may be of illegitimate traffic, it may be of enemy character, it may be of illegal action or service or what not, but there must be such suspicion as warrants inquiry into the facts and adjudication upon them by a properly constituted Court—see the judgment of Story, J., in the *George,* quoted with approval in the *Ostsee.* Even slight grounds of suspicion may suffice. In the *Elizabeth* the reason given by the Lords of Appeal for condemning the captors in costs was that there appeared to be scarcely any ground for detaining the vessel. The Judicial Committee's judgment in the *Baron Stjernblad* develops the matter. In a case where it has become apparent, by statistical evidence or otherwise that a considerable proportion of the collective imports into a neighboring neutral country of a particular commodity, which is in its nature contraband, does in fact proceed by a continuous transit into the enemy territory, any particular importer of such goods belongs to a class of importers, some of whom, at any rate, must be obviously engaged in contraband trade. Suspicion then attaches to all, and the question is one of the existence of reasonable suspicion, not of the possession of proof attaching that suspicion to a particular member of the class. The suspicion, for example, attaches to the particular goods by reason of the circumstance connected with the class of goods generally that it is in its nature contraband. Those who seize on the grounds of reasonable suspicion are entitled to the benefit of such evidence as other officers of the Crown may possess as to ulterior destination, and are not limited by the information, or the lack of it, to be found in the ship's papers themselves."[1]

[1] Compare in this connection the decision of the Naval Prize Tribunal in the case of the *Canadia* (X Lloyd 421), regarding claims of ship and cargo owners for damages due to the negligence of the officer in command of the prize crew in allowing to run ashore a neutral ship captured on suspicion of carrying contraband cargo.

In the case of the *Edna*,[1] the Prize Court released a vessel which had been seized on suspicion of having been unlawfully transferred from an enemy to a neutral flag but refused to allow the owners anything for damages or costs, on the ground that there was reasonable cause justifying the seizure. The Court also refused to allow the claimants anything in the nature of profits earned by the use of the vessel while under requisition by the British government, for the reason that there was nothing in the relations between captors and claimants, still less between the British government for whose use the ship was requisitioned, and the shipowners, which would support such a claim. The judgment was affirmed by the Judicial Committee. Nevertheless Lord Sumner took occasion to say:

"It is right to recognize that a result which restores the ship to her owners, but leaves them without recompense of any kind for the loss of the use of her between 1916 and 1919, must be profoundly disappointing to them, and may seem to be not without some suspicion of paradox in law. It would be unsatisfactory that so long a time should have elapsed before this cause could be brought to an issue, were it not that the claimants do not seem to have taken any active steps to accelerate it, and may well be supposed to have recognized that the delay was one which they could not fairly complain of. It is to be hoped, however, that whatever the conditions of future wars may be, this case may never be regarded as anything but highly exceptional in this particular."

In the case of the *Constantinos*,[2] the Prize Court for Egypt, although not asked to award compensation or damages, held that the suspicions aroused in consequence of the unsatisfactory condition of the ship's papers justified the naval authorities in bringing the vessel before the Prize Court, so that the owners had "only to thank themselves for any loss or inconvenience which they may have suffered in consequence."

In the case of the *Galway Castle*,[3] the South African Prize Court refused to allow costs for the seizure of goods on a British ship which were restored, partly because the legal question involved was a "difficult one" and because, apart from the legal question, there was suspicion justifying the seizure. But the supreme court of Gibraltar in the case of the *Cretic*[4] allowed damages and costs for the seizure and detention of a quantity of oil consigned to a company at Genoa and shipped on a British

[1] IX Lloyd 51, 70; III Br. & Col. Pr. Cas. 407, 926. See further as to this case Secs. 283 and 315, *supra*.
[2] II Br. & Col. Pr. Cas. 140.
[3] *Cases Decided in the Prize Courts of South Africa*, p. 63.
[4] III Br. & Col. Pr. Cas. 967.

vessel, on the ground that the seizure and unloading of the goods at Gibraltar were "wholly unreasonable." The ship arrived on March 1 and the bills of lading were properly handed over but the writ was not taken out until three days later, although during this period the Crown had ample opportunity to proceed. From the moment the bills of lading were handed over, it was manifest that there was no legal right to detain the cargo; the claimants were therefore entitled to damages and expenses from that moment. The Court added: "It has been said that judges have been astute to find reasons to justify seizures, but I confess that my astuteness is not equal to the task in the present case."

In the case of the *Stigstad*,[1] the Prize Court held, and the judgment was affirmed by the Judicial Committee, that the owners of a neutral vessel were not entitled to claim from the Crown expenses incurred by them while the vessel was under detention in the port of Leith to which she had been taken by the captor in pursuance of the Reprisals Order, nor for damages on account of the detention of the vessel beyond the date when the discharge would have been completed at Rotterdam. Sir Samuel Evans said he thought, without deciding the question, that he had the right to award compensation for undue delays and for unnecessary expenses caused thereby but in this case he held that there was no further delay or inconvenience than was inevitable or necessary in carrying out the Reprisals Order. The Crown, he said, could not justly be held liable for losses sustained by neutral shipowners unless it had acted wrongly and without reasonable ground or probable cause.

Sec. 467. Damages Not Allowable as a Charge Against Cargo. British Decisions. In a number of cases the Prize Court was called upon to decide whether shipowners' claims for damages or expenses resulting from detention or diversion of their vessels might be allowed, not against the Crown (as for example in the *Stigstad* case) but against the cargo owners. Such a case was that of the *Rio de Janeiro*,[2] where the owners of a neutral vessel which had been diverted to an English port in pursuance of the Reprisals Order and where a part of the cargo was ordered to be detained, put in a claim for damages occasioned by the detention of the vessel and asked that it be allowed out of the proceeds of the goods. Lord Sterndale adverting to the fact that the cargo owner against whom the claim

[1] V Lloyd 361, 386; II Br. & Col. Pr. Cas. 179, and III, *ibid.*, 347.
[2] VIII Lloyd 324.

was made was not present to be heard, and that there was no charge that he had done anything wrong, asserted that there was no legal ground upon which the claim against him could be supported. The only basis for such a claim was that in the discretion of the Court the money "ought to be ordered to be paid to the shipowner, because it is just, right, and fair that it should be." Referring to the case of the *Gorontalo*,[1] in which Sir Samuel Evans had allowed similar expenses, His Lordship continued:

"I should have had no hesitation about the matter, but for the decision of the late President in the *Gorontalo*. In that case very similar expenses were allowed. They were not quite the same, because in that case the ship had not discharged the goods, and had been allowed to proceed by agreement with the Crown, and had taken the goods to Holland on an undertaking to bring or send them back again. . . . Still I think the principle of the expenses is the same, because in both cases the shipowner's argument is that he has had to incur extra expenses, and has lost the use of his ship for a certain time, in consequence of cargo being on board which has been ordered to be discharged for the extra expenses. In the *Gorontalo* the whole of the expenses were incurred in respect of a particular parcel of cargo. There was no mixing up of different parcels, each of which occasioned deviation, and detention, as there is here, and it may be that this fact had some influence on the learned President's mind when he allowed the expenses in that case. . . . I do not think that case does lay down a general principle which obliges me to allow these expenses and damages. . . . I do not see any ground on which I ought, in the exercise of my discretion, to allow this claim against the cargo."

Lord Sterndale reached the same conclusion in the case of the *Heim*,[2] where the shipowner asked for a large sum for freight, demurrage, and compensation for services rendered by his ship at the request of the British admiralty in connection with the discharge of the cargo and for damages and expenses sustained and incurred on account of the seizure and detention of the vessel and cargo, the same to be made a charge upon the cargo which had been ordered to be sold. There was no case, he said, in which a claim for damages for detention and demurrage had ever been allowed as a charge against the goods, and again he denied that the decision of Sir Samuel Evans in the *Gorontalo* was a case in point.[3] The same decision was reached in the case of the *Einar Jarl*.[4]

[1] VIII, *ibid.*, p. 333 (note).
[2] VIII Lloyd 484; III Br. & Col. Pr. Cas. 459.
[3] Nevertheless Lord Sterndale observed that "if there had been thrown upon the shipowner expenses, for instance, which would otherwise have been thrown upon the cargo owner, they must be paid by the cargo owner when he gets his cargo, because he is relieved of expenses which he would otherwise have had to pay."
[4] IX, *ibid.*, 326; III, *ibid.*, 547 (note).

"I can see no reason whatever," said Lord Sterndale, "why when you have two innocent persons, as you have in this case, neither of whom has done anything which is a breach of contract, but both of whom have been prevented from performing it by the act of a belligerent, and loss has been occasioned to one of these parties, I should transfer that loss from the shoulders of one innocent party to the shoulders of the other . . . the fact was that the Crown—whether reasonably or unreasonably—thought the circumstances suspicious, and so arrested the cargo, but there was nothing done by the cargo owners in any way which was wrong."

The claim against the Crown was also disallowed, on the basis of the decision in the *Stigstad* case that no damages were recoverable against the Crown unless it had acted wrongly and without any probable ground or reasonable cause. That, he said, was "an unfortunate consequence of a state of war between belligerent nations, and it would be an improper restriction of the rights of a belligerent to say that where he has acted properly and reasonably in the exercise of his rights, he should have to pay for loss occasioned in consequence." His conclusion was that no ground for wrongful seizure in this case had been made out against the Crown and considering that hundreds of vessels had to be examined, requiring discharges of cargoes, he did not think there had been any undue delay. Sir Henry Duke adopted the same view in the case of the *Donald*.[1]

Sec. 468. The Same. French Decisions. It may be observed at the outset that the French Prize Council declined to take jurisdiction of claims for indemnities except where they were incidental to the decision as to the validity of the capture. Consequently, in contraband cases it rarely passed upon claims for damages other than those made by owners of cargoes seized as contraband and subsequently released or condemned upon payment of compensation. In the case of claims made by owners of ships transporting contraband, the Council frequently declared itself to be without jurisdiction for the reason that the vessels seized had been authorized after the discharge of their cargoes to proceed on their voyages. In cases where the ship had been formally seized, claims for damages were nearly always disallowed, on the ground that notwithstanding the subsequent release of the goods there were sufficient reasons to justify the seizure.[2] Similarly, where a ship was seized on suspicion that it had been unlawfully transferred from an enemy to a neutral flag, the interested parties were not entitled to damages when there were

[1] IX, *ibid.*, 356; III, *ibid.*, 359.

[2] See, among others, the case of the *Narrovian* (Fauchille, *Jurispr. Franc.*, p. 69), the *Gorontalo* (*ibid.*, 73) and the *Jiul* (*ibid.*, 27).

sufficient reasons to justify the seizure and such reasons were held to exist when the vessel was engaged in trading in the vicinity of the theater of hostilities and was unable to prove its right to fly a neutral flag.[1]

As to claims of cargo owners for damages resulting from the seizure of contraband goods which were released or from delays in restoring them, they were nearly always disallowed on the ground that there were sufficient reasons justifying the seizure, although the reasons often consisted of nothing more than suspicion.[2] Justifiable reasons for seizure were held to exist where the goods were consigned to order, where the ship's papers did not show an innocent destination, and where they were incomplete or irregular.[3]

In a very few claims, indemnities were allowed. For example, in the case of the *Appolonia,*[4] where a cargo of dried skins consigned to a neutral port (Italian) had been seized and sold on the ground that there were in force in Italy two decrees prohibiting the exportation of dried skins. The owners were allowed the intrinsic value of the goods and also as damages a sum representing their value at the moment at which the ship carrying them would have arrived at its destination.

Sec. 469. The Same. German Decisions. The German Prize Courts were guided by Article 8 of the German Prize Code which declares that "the parties interested" are entitled to compensation in damages for the capture of a vessel or the seizure of goods, if the validity thereof is not upheld by the Prize Court, or if they are released before Prize Court proceedings are begun, unless there are sufficient grounds (*ausreichende Gründe*) to justify the capture or seizure. The words "the parties interested" were interpreted to embrace not only neutral owners of ships or cargoes but all other persons whose rights were directly affected by the seizure. In this respect the jurisprudence of the German Prize Courts differed from that of the French Prize Council which, as we have seen, declined to take jurisdiction of claims for damages except when they were accessory to the decision on the validity of the seizure. Consequently, the French Council rarely considered claims other than those made by the

[1] Cases of the *Virginia* and the *Indiana* (*ibid.*, pp. 261, 265).
[2] See, among others, the cases of the *Nieuw Amsterdam* (*ibid.*, 14), the *Eir* (*ibid.*, 32) and the *Rioja* (*ibid.*, 141).
[3] For example the *Jiul* (*ibid.*, 27), the *Karimata* (*ibid.*, 62), the *Atlas* (*ibid.*, 40), the *Joannina* (*ibid.*, 275) and the *Iberia* (30 *Rev. Gén.*, 1923, *Jurispr.* 1).
[4] *Ibid.*, p. 66.

owners of the ship or the goods. For this reason a much larger number of cases involving claims for damages came before the German Prize Courts than before the French Prize Council. Thus the German Prize Court held that the members of the crew of a neutral ship which had been unlawfully seized or destroyed and who had sustained losses thereby were included in the category of "interested parties" and therefore entitled to claim damages for the destruction of their personal effects.[1]

A large number of cases came before the German Prize Courts involving claims for damages made by the owners of goods captured or destroyed on neutral vessels sunk by German submarines, usually on the alleged ground that the vessels were carrying contraband. The question to be determined was usually whether there were sufficient grounds to justify the seizure or destruction of the ship. In the case of the *Elida*,[2] the Prize Court at Kiel released a Swedish vessel and its cargo but dismissed the claim for compensation on the ground that there were sufficient reasons to justify the seizure. The commander in making the seizure had erroneously interpreted the prize regulations, in holding that the cargo which consisted of timber for mines might be considered as firewood and therefore conditional contraband. The decision of the lower court was overruled, however, by the supreme court, on the ground that incorrect interpretation of the prize regulations can never be regarded as sufficient ground for seizure. The shipowner's claim for damages on account of loss which he had sustained was accordingly allowed.

The same principle was applied by the supreme court in the case of the *Gefion*[3] (overruling the Prize Court at Kiel), where it was held that when a superficial examination of the cargo would have enabled the captor to recognize that it was not contraband, there were no reasons sufficient to justify the seizure and consequently the owner of the goods was entitled to damages.

But the Court held that there were justifiable reasons where the legal presumptions regarding enemy destination existed and the burden of proving the contrary had not been discharged by the claimant. Thus it was held that there were sufficient reasons justifying a seizure when the ship carried a full cargo of contraband, was destined to a fortified place and the goods were

[1] The *Storesand*, I *Entsch.* 298; Fauchille et De Visscher, *Jurispr. All.* 225. Also the *Draupner*, II *Entsch.* 162.
[2] I *Entsch.* 9; Eng. text, 10 *Amer. Jour.*, p. 916.
[3] I *Entsch.* 21; Fauchille et De Visscher, 16.

consigned to a house completely unknown to the captor and the name of which afforded no guarantee that the goods would not be used for military purposes. Although the seizure was held to have been invalid no damages were allowed.[1]

On the other hand, damages were allowed in the case of a wrongful seizure when the captor had erroneously interpreted a clause in the bill of lading. The Court declared in this case that in determining whether there were sufficient reasons to justify the seizure it was necessary to be guided not by the personal opinion of the captor but by an objective criterion.[2] Similarly, the captor was charged with the costs and expenses of prize proceedings where the seizure of the goods was based upon an erroneous interpretation of the prize ordinance by the German authorities.[3]

The German Supreme Prize Court held that seizures were sufficiently justified when there existed strong suspicion that the contraband goods had an enemy destination and the ship was accordingly taken in for the purpose of more effective search, and the goods were released; consequently the owners were not entitled to damages for the seizure and detention.[4] Even when the goods so released had lost their value at the time of restitution, in consequence of long detention, the claimants were not entitled to compensation; they are, said the Court, bound to submit to the occasional consequences of the exercise of the right of capture, justifiable in itself, and have no right to damages except where undoubted fault on the part of the captor has been established.[5] Moreover, when the goods had been released the German state could not be charged with the costs and expenses of the proceedings before the Prize Court; and when they have been placed under sequestration and subsequently released by the Prize Court the owner must bear the loss resulting from the seques-

[1] The *Alfred Hage*, I *Entsch.* 25; Fauchille et De Visscher, 19. To the same effect see, among other cases, the *Modig*, the *Mjölner*, the *Goethe*, and the *Thorsten*, I *Entsch.* 41, 292, 85, 253; Fauchille et De Visscher, 30, 67, 192. In the last-mentioned case the Court laid it down that the award of the indemnity should be fixed on the basis of the value of the goods at the time of seizure, in the country from which they were shipped and not in that of the captor country.

[2] The *Norefos*, I *Entsch.* 30; Fauchille et De Visscher, 23.

[3] The *Thorsten*, I *Entsch.* 253; Fauchille et De Visscher, 79.

[4] See, among other cases, the *Star* and the *Gotaland*, I *Entsch.* 66, 198; Fauchille et De Visscher, 53, 152. In the latter case it was held that there were justifiable motives for the seizure because the captor believed that the ship contained contraband and that it intended to resist capture, since it refused to stop upon summons and in fact turned and directed itself toward the captor ship. See also the case of the *Bretland*, II *Entsch.* 230.

[5] The *Zaanstroom*, I *Entsch.* 118; Fauchille et De Visscher, 97.

tration, if the placing of them under sequestration was justified by sufficient reasons.[1]

Claims for damages were also disallowed where the vessels transporting contraband were seized on suspicion of engaging in unneutral service, where they had been unlawfully transferred from a belligerent to a neutral flag, where there was doubt as to their neutral nationality and where the ship's papers were insufficient.[2]

Sec. 470. Claims for Damages Where Neutral Vessel Is Taken in for Search and Not Formally Captured. In such cases the French Prize Council declined to take jurisdiction of claims for damages, on the ground that its competence extended to the passing on claims for damages only when the claim was accessory to a decision as to the validity of the capture. Where, therefore, a vessel was taken in for search or for the discharge of suspected goods and never subjected to a formal capture, and where, after the discharge of the goods or their release, the vessel was allowed to proceed on its voyage, the Prize Council held that it was incompetent to judge claims for damages.[3]

The German Prize Courts, in effect, followed the same principle when they distinguished between the taking of a vessel in (*Einbringung*) and formal seizure or capture (*Aufbringung*), and declined to take jurisdiction of claims for damages in the former case.[4]

The English Prize Courts, on the other hand, asserted jurisdiction over claims for damages in these, and in fact, in nearly all cases in which such claims were made. In the case of the *Montana*,[5] the Prize Court at Malta heard and disallowed claims for damages, made by the owners of a neutral vessel which had been seized while on a voyage from Piraeus to a Turkish port and taken first to Mudros and later to Malta for the purpose of a

[1] I *Entsch.* 129; Fauchille et De Visscher, 95.

[2] The *Runhild*, II *Entsch.* 196; the *Blommersdijk*, II, *ibid.*, 108; the *Balto*, II, *ibid.*, 202, and the *Orion*, II, *ibid.*, 1.

[3] See, among other cases, the *Insulinde* (Fauchille, *Jurispr. Franc.*, 21, the *Atlas* (*ibid.*, 40) and the *Gorontalo* (*ibid.*, 72).

[4] See, for example, the case of the *Bertha Elisabeth* (I *Entsch.* 55; Fauchille et De Visscher, 45), where the supreme Prize Court affirmed that the jurisdiction of the German Prize Courts embraced only the power to pass on the validity of captures; that by prizes was meant ships of commerce seized in the exercise of the right of capture and that there was no capture when a vessel was simply taken in for the purpose of visit without any intention of capturing it, and when after search it was released. Consequently the Prize Court was incompetent to hear the demands of the claimants for damages. To the same effect see the cases of the *Goethe* (*supra*), the *Thorsten* (*supra*) and others.

[5] III Br. & Col. Pr. Cas. 340.

more complete examination of the cargo, and which after having been released and allowed to proceed, was again stopped and allowed to proceed to her destination only after her holds had been sealed, thus preventing the landing of the cargo. The claimants contended that there was no justifiable reason for the taking of the vessel to Malta or for the subsequent sealing of her holds, and that the necessary diligence had not been displayed to avoid the delays to which she had been subjected. The Prize Court held that owing to the lack of facilities at Mudros for chemical analysis of the cargo, the naval authorities were justified in taking the vessel to Malta where there were such facilities and that the period of detention for the purpose of the examination was no longer than was reasonably necessary. As to the subsequent treatment of the vessel, the Prize Court held that the suspicion regarding her movements justified the measures taken. "It is obvious," said the Court, "that the question to be decided depends on the particular circumstances of the case and it is impossible to define which facts constitute reasonable suspicion, as they are so multifarious as to render it impossible to give an exhaustive enumeration of all." Regarding the validity of an order issued by the naval authorities to the effect that vessels proceeding to the port of Vourla near Smyrna (the port of destination of the *Montana*), should be allowed to proceed thereto only if they consented to have their holds sealed up, the Court said:

"In regard to this order, it was urged by the claimants that it is against the principles of international law, and consequently it does not commend itself for its application to an English Prize Court. It does not, however, seem repugnant to those principles to hold that the right of visit and search includes that of securing such part of the cargo which may appear suspicious and of preventing its being discharged at a given port, without actually seizing it. The issue of the circular above referred to was evidently suggested by occurrences which might have given rise to suspicions that goods discharged at Vourla had in some instances an ultimate hostile destination.[1]

Large numbers of neutral vessels were taken into British ports or compelled to enter them for the examination of their cargoes and not only were claims for damages resulting from long detentions usually disallowed but the expense of the detentions had to be borne by the owners—against which neutral governments vigorously protested.[2]

[1] See further as to this case, Sec. 444, *supra*.
[2] The practice of taking in neutral vessels for search is more fully discussed, *supra*, Sec. 443.

Sec. 471. Damages for the Destruction of Neutral Vessels and Cargoes. The World War was distinguishable from all others of the past by reason of the large number of neutral vessels (including usually their cargoes) which were destroyed by their captors.[1] The destruction was in the great majority of cases done by German or Austrian submarines. Claims were made in many cases for the value of the ship or goods on the ground that the vessel was destroyed without justifiable reasons or that it or the cargo, or both, were not liable to condemnation.

In one group of cases where the captor resorted to destruction because he believed, or professed to believe, that the ship or goods were liable to condemnation, the Prize Court subsequently held that the exceptional circumstances which justify destruction did not in such cases exist or that there were not sufficient reasons to warrant condemnation. In deciding the claims for damages which came before the German Prize Courts, they based their conclusions on Article 115 of the prize code, which provides that if a neutral vessel is destroyed and the Prize Court holds that the exceptional circumstances (enumerated in article 113—See also Art. 49 of the Declaration of London) justifying destruction did not exist, the owners of the vessel and the cargo, whether they were liable to condemnation or not, are entitled to compensation for damages sustained and that they are equally entitled to compensation if the said circumstances existed but the vessel or cargo were held not to have been liable to condemnation. This Article was also related to Article 8 of the German prize ordinance which allows compensation where the vessel or goods have been released before the beginning of prize proceedings, unless there were justifiable grounds for the seizure or capture. In the case of the *Davanger*,[2] where a vessel believed to be an enemy ship was destroyed but which was held by the Prize Court to have been a neutral (Norwegian) ship, the Prize Court held that the question of the obligation of Germany to indemnify the owner must be determined on the basis of Article 8 and not on that of Article 115. Thus, although according to Article 115 the owners would have been entitled to compensation because the vessel was not liable to condemnation, by the application of Article 8, their claims were disallowed because justifiable reasons for the destruction existed (namely, the impossi-

[1] As to the details see my *International Law and the World War*, Vol. II, ch. 31. See also the *Aperçu Général* in Verzijl, *op. cit.*, pp. 1048-49.
[2] I *Entsch.* 232; Fauchille et De Visscher, 177.

bility of establishing the nationality of the vessel at the time of capture).[1]

This same rigorous interpretation as applied to vessels regarded as having *enemy* nationality was applied equally in the case of those whose nationality was incontestably *neutral*, on the ground that the rule laid down in Article 115 constituted an exception to the general principle embodied in Article 8. Consequently, the general rule which excludes damages where justifiable reasons for destruction exist even though the ship or goods were not liable to condemnation, was applied. The result was that owners of neutral vessels not liable to confiscation but which were destroyed under circumstances justifying seizure were denied compensation, and so were other parties interested (e.g. members of the crew) who if Article 115 had been applied would have been entitled to compensation.[2]

In fact there do not appear to be any German decisions unfavorable to the captor whenever his defence was that he acted in the face of exceptional necessity, and that consequently the destruction was justifiable for good reasons. In all such cases claims for damages or compensation were disallowed. On the other hand, where the Prize Court pronounced invalid captures which had led to the destruction of neutral ships, the Prize Courts, applying Article 115 of the prize ordinance, allowed compensation to the owners of such vessels and of innocent cargoes, even when there existed justifiable reasons for the seizure.[3] Whether the claims of parties of *enemy* nationality, interested in such vessels or cargoes would have been allowed is doubtful.

[1] See also the similar case of the *Havlyst*, II *Entsch.* 237.

[2] See, for example, the case of the *Trudvang* (I *Entsch.*, 276; Fauchille et De Visscher, 209), where compensation was denied to the members of the crew of a neutral vessel destroyed, for the loss of their personal effects, in accordance with Article 115, because that Article allowed damages only to the "owners of the vessel and cargo" and not to the "parties interested," as did Article 8. Moreover, the owner of the ship was not entitled as an "interested party" under Article 8 to claim damages for the crew. To the same effect see the *Storesand* (I *Entsch.* 298; F. et De V., 225) and the *Cocos* (I *Entsch.* 141; F. et De V., 107). In the last-mentioned case where the destruction of a neutral ship and its cargo was held to have been justifiable, although they were held not to have been liable to condemnation, and compensation would have been allowed under Article 115 of the prize ordinance to the owner of the ship and cargo for the loss of freight and the value of the ship but for the fact that the advocate of the claimants did not possess evidence of his authority as their representative, it was held that no compensation was allowable for damages caused indirectly to third parties, e.g., to the captain who had lost his employment in consequence of the destruction of his vessel and to the members of the crew, whose personal effects had been lost with the ship, since the latter could not be assimilated to neutral goods destroyed with the ship, in the sense of Article 115.

[3] See, among others, the cases of the *Storesand*, the *Cocos*, and the *Trudvang*, cited above.

Article 8 in general terms declares that the "parties interested" shall be entitled to compensation and this category literally interpreted would undoubtedly embrace claimants of enemy nationality. The German Prize Courts appear never to have pronounced definitely on the question; there are dicta in several cases which support both the affirmative and the negative view.[1]

Very few cases involving claims for compensation for the illegal destruction of neutral vessels or cargoes came before the Prize Courts of other countries.[2]

Sec. 472. Claims in Case of Unavoidable Destruction of Innocent Goods on Vessel Legally Destroyed. A large number of cases came before the German and Austro-Hungarian Prize Courts involving the claims of neutral owners of goods not liable to condemnation but which had been destroyed with the ship, which itself had been lawfully sunk. The Declaration of London (Art. 53) lays down the rule that where neutral goods on a *neutral* vessel not liable to condemnation have been destroyed with the vessel, the owner of the goods is entitled to compensation and it makes no distinction between the legal and illegal destruction of the vessel. It would seem therefore that the owner of the goods would be entitled to compensation regardless of whether the destruction of the ship was lawful or unlawful. Likewise Article 53 of the Declaration of London does not distinguish between neutral goods on enemy ships and those on neutral ships, but apparently it was not intended to deal with compensation for neutral goods destroyed on enemy ships,[1] since Article 3 of the Declaration of Paris already protected them.

Three groups of cases involving claims for indemnities for the destruction of innocent goods on ships which were lawfully sunk came before the Prize Courts. They were: (1) claims by the owners of innocent neutral goods sunk on enemy ships; (2) claims by the owners of non-confiscable enemy goods sunk on a neutral ship; and (3) claims by the owners of innocent neutral goods sunk on a neutral vessel. The decisions in each of these groups of cases are here discussed in turn.

[1] For example, the *Mineral No. 2* (I *Entsch.* 292) and the *Papelera* (*ibid.*, 334).

[2] One such case was that of the *San Nicolo* (Fauchille, *Jurispr. Franc.* 250), where the French Prize Council declared invalid the capture of a neutral vessel (Greek), but held that its subsequent destruction was justifiable for military reasons. The Council held that the owner was entitled to an indemnity for the loss of his ship and that the captain and members of the crew were entitled to restitution of their personal effects.

[3] Compare Bentwich, *Declaration of London*, p. 100. This inference is strengthened by the fact that Article 53 is part of a chapter entitled "Destruction of *Neutral* Prizes."

Sec. 473. Destruction of Innocent Neutral Goods on Board Enemy Ship. Cases of the "Glitra" and Others. Nearly all the decisions involving claims in these cases were rendered by the German Prize Courts. The first and best known of these cases was that of the *Glitra*, decided by the Supreme Prize Court in July, 1915.[1] The *Glitra* was an English merchant vessel which was sunk by a German submarine on October 20, 1914. The Prize Court held that Article 114 of the German prize ordinance which lays down the instruction that before the commander proceeds to the destruction of a vessel he must consider whether the damage done thereby to the enemy will outweigh the amount of the indemnity which would have to be paid for the destruction of innocent goods thereon, applied only to goods on *neutral* and not to those on *enemy* vessels. The correctness of this interpretation may be seriously doubted. The language of the Article does not in terms limit its application to neutral vessels and its position in the prize ordinance, coming as it does immediately after two articles relating respectively to both enemy and neutral vessels, it might naturally be held to apply to both alike. The intention of the authors of the ordinance to provide for compensation in such cases was assumed by German text writers [2] and the discussions of the subject at the London Naval Conference show that the German delegation so understood it.[3] The Prize Court itself evidently entertained doubt as to the correctness of its conclusion on this point for it took occasion to observe that even admitting that the authors of the prize ordinance believed that the owners were entitled to compensation in such a case, it would be incorrect to regard their opinion as final on a question like this which was doubtful and disputed. Apart from the question of the applicability of Article 114 of the German prize ordinance to the case of innocent goods destroyed on an enemy vessel, the holding of the Court that under the rules of international law the owners were not entitled to compensation was of even more doubtful validity. In the first place, the Prize Court relied upon the silence of the Declaration of London as to the obligation of a belligerent to make compensation in such cases. Attention was called to the memorandum of the French government submitted to the Naval Conference in which

[1] I *Entsch.* 34; Fauchille et De Visscher, *Jurispr. All.*, 25; Eng. trans., 10 *Amer. Jour.* 921.

[2] Perels, *Das Int. Offentlichrecht der Gegenwart*, p. 299.

[3] Brit. Parl. Papers, 1909, Misc. No. 5, pp. 99, 171. See also the comments of Professor Quincy Wright, "Destruction of Neutral Property on Enemy Vessels," 11 *Amer. Jour.* (1917), pp. 265-67.

the view was expressed that the owners of neutral goods lost on an enemy vessel destroyed for justifiable military reasons were not entitled to an indemnity. The question was discussed but no conclusion was reached. In the second place, the Court held that Article 3 of the Declaration of Paris protected the goods only from seizure and was never intended to establish an obligation on the part of a belligerent to make compensation in case they were lost with the vessel if it were destroyed as an act of military necessity.[1] Finally, the decision of the French Prize Council in the case of the *Ludwig* and the *Vorwaerts,* upon which the German Prize Court in the case of the *Glitra* mainly relied, really established nothing more than that a belligerent is not bound to make compensation to neutrals for the destruction of property when the destruction is an act of military necessity, which was hardly the fact in the case of the *Glitra.*

The German Prize Court reaffirmed its view in the cases of the *Indian Prince*[2] and the *Indrani.*[3] In the former case the Prize Court relied on a statement of the drafting committee relative to the meaning of Article 64 of the Declaration of London, to the effect that innocent goods on board a captured vessel suffer the fate of the vessel and consequently if there were sufficient reasons for the capture of the vessel the owners of the goods are not entitled to compensation even though the capture of the vessel was held to be invalid. But it may be doubted whether Article 66 was applicable to the case of goods on a vessel which has been "destroyed." In fact it speaks only of vessels which have been "captured" and not of those which have been "destroyed." Furthermore, the Report accompanying the Declaration seems to show that the losses for which it was not intended to provide compensation were merely incidental losses resulting from delays, deterioration in the value of the goods, etc., and not those resulting from the destruction of the goods themselves.[4]

Sec. 474. Destruction of Innocent Enemy Goods on Neutral Vessel Lawfully Sunk. In the cases discussed in the preceding section, the question involved was the liability of a belligerent to make compensation for the loss of innocent goods destroyed on an *enemy* ship lawfully sunk. We come now to the

[1] Discussed more at length in Sec. 274, *supra.*

[2] I *Entsch.* 87; Fauchille et De Visscher, *Jurisp. All.* 69, Eng. trans., 10 *Amer. Jour.* 930.

[3] I, *ibid.*, 95; *ibid.*, 74. As to these two cases, see further, Secs. 107, 238, 274, *supra.*

[4] See the learned discussion of the whole question by Professor Wright in the Article cited above, especially pp. 367-72.

case of non-confiscable *enemy* goods when destroyed on a *neutral* ship, the sinking of which is held to be lawful. Here, as in the former cases, the German Prize Courts refused to allow compensation to the owners of the goods, on the ground that Article 115 of the prize ordinance provided for compensation only for the destruction of inoffensive *neutral* goods.[1] As to the Declaration of Paris which protects non-contraband enemy goods under a neutral flag, that was held to protect them only against *seizure* and did not therefore require compensation in case they were lost on a neutral vessel lawfully sunk. According to the view of the German Supreme Prize Court the only case in which compensation was allowable was where innocent neutral goods had been destroyed with a neutral vessel which was not liable to condemnation and even here Article 115 of the prize ordinance which provides for compensation in such cases was so strictly interpreted that claimants were often unable to establish their right to an indemnity.[2]

The Austro-Hungarian Prize Court adopted the same view as that of the German Prize Court, in respect to the obligation to indemnify the neutral owners of innocent goods lost on an enemy vessel held to have been lawfully sunk.[3]

Sec. 475. Damages for Deterioration or Loss of Goods Resulting from Fault of Captor. In such cases the captor is liable in damages unless the legality of the capture has been upheld by the Prize Court. In the case of the *Helicon*,[4] a Norwegian vessel carrying a cargo of coal had been seized on suspicion by a German cruiser. After being required to discharge a part of its cargo at sea, the ship was released with the remaining cargo and allowed to proceed to its destination. The vessel was seriously damaged in the course of the trans-shipment of the cargo at sea. The German Prize Court held that the owners of the cargo were entitled to the value of the coal seized and that the shipowner was equally entitled to a sum sufficient to cover the amount of damages to his vessel resulting from the illegal seizure, but not for the value of the ship itself, which had been sold, since the sale was not the consequence of anything the German naval forces had done, nor for any expenses which were

[1] The *Mineral No. 2*, I *Entsch.* 292; Fauchille et De Visscher, *Jurispr. All.* 221.
[2] See the cases cited by Verzijl, pp. 1070-73.
[3] See, among others, the cases of the *Firenze*, the *Yusaka Maru*, and the *Langthon Hall—Normal Verordnungsblatt für die K. u. K. Kriegsmarine*, 1917. *Stück*, 11, p. 131; *Stück*, 40, pp. 502-504.
[4] I *Entsch.* 100; Fauchille et De Visscher, 313.

not directly the result of acts causing the damage. Unlike the English courts,[1] the German Prize Courts declined to take jurisdiction of claims for losses or damages caused by other persons than the captors.[2] Where the loss of goods seized was the consequence of *force majeure* or accident the German Prize Courts allowed compensation only when the seizure was made without justifiable reasons. Thus compensation was refused where a neutral ship while being taken into a home port, and which had been seized on justifiable grounds, was lost in consequence of striking a mine.[3]

In the case of the *Oscar II*[4] Lord Sterndale held that the Procurator-General of the Crown was liable for damages on account of the loss of innocent neutral goods on a neutral vessel which was sunk by a collision with a British warship while the latter was endeavoring to capture the vessel, the collision being due to the negligence of the captor. The Procurator-General was held liable because under the Prize Court rules of 1914 he was substituted for the actual captor, who under the old prize procedure would have been held liable for negligence in effecting the capture. Lord Sterndale thought that whenever the Crown chose to take advantage of a seizure it was subject to the same liability as the captor would have been if he had done the same. If that was so it was admitted that the captor in these circumstances would have been liable for injury caused by his negligence in respect of goods which were not liable to condemnation. The judgment was affirmed by the Judicial Committee.[5]

But in the case of the *Craigsla* the South African Prize Court[6] held that there was no negligence on the part of the admiralty where while a Norwegian ship chartered to a German firm and after the discharge of its cargo in a South African port, was being removed from the dock, an accident occurred which resulted in an injury to the ship's rudder. In these circumstances the Prize Court refused to allow damages to the owners.

[1] See, for example, the *Lützow*, VI Lloyd 289.
[2] See, among other cases, the *Zaanstroom* (I *Entsch.* 118).
[3] The *Runhild* (II *Entsch.* 196).
[4] IX Lloyd 267; III Br. & Col. Pr. Cas. 421.
[5] IX, *ibid.*, 282; III, *ibid.*, 588.
[6] *Cases Decided in the Prize Courts of South Africa*, p. 73. Compare also the French case of the *Volea* (or *Volia*), (28 *Rev. Gén.*, 1921, *Jurispr.* 10), where the Prize Council refused to award to the owners the value of a captured ship which had been lost on account of the state of the sea.

CHAPTER XVII

INDEMNITIES AND DAMAGES (CONTINUED)

I

Claims for Freight

Sec. 476. Claims of Captor Against Owners of Innocent Goods Carried on Enemy or Non-Enemy Ships. British Decisions. Claims made before the Prize Courts for sums in respect to freight were very numerous during the World War. These claims may be grouped into several classes. First, there were those made by the captors of both enemy and neutral ships which were declared to be good prize, against the owners of goods carried on them, when the goods were not liable to condemnation and had been released by the Prize Court. The general rule of English prize law is that the captor in such cases has a right to claim freight from the owners of the goods only when he has carried them to their port of destination, in accordance with the intention of the contracting parties. This view was affirmed by Sir Samuel Evans in the case of the *Roland*, decided in March, 1915.[1] The *Roland* was a German vessel which sailed from New Orleans for Bremen in July, 1914, with a cargo consisting among other things of a quantity of tobacco, three-fourths of which was neutral property and which was released by the Prize Court. The Crown claimed against the owners of the released cargo proportional freight for the carriage of the goods from New Orleans to Plymouth to which latter port the ship and cargo had been taken after their capture. They relied on a rule of German commercial law which allows shipowners some freight in respect to released cargoes, although in this case the cargo was not and could not have been delivered at the port of destination (Bremen). As captors, the Crown was, they argued, entitled not only to the ship but also to what the ship had earned as freight.

[1] II Lloyd 253; I Br. & Col. Pr. Cas. 188.

Sir Samuel rejected this argument which, he said, sounded quite logical but, he added, "the practice of Prize Courts shows that, although substantial justice is done, the results of what strict logic may appear to involve cannot always be attained." The old rule laid down by the Prize Courts,[1] he said, one which had never been departed from, and which was a part of the law of nations, was that when a captor took the goods to the port of actual destination according to the intent of the contracting parties he was entitled to the freight, on the ground that the contract had been fulfilled, but in all other cases he was not entitled to any freight, even though the ship had performed a very large part of the voyage. This rule he could not abandon and allow some freight where only a part of the voyage had been covered. The rule was, he said, based "on the broad business ground that the goods had not been carried to the place where the contracting parties had intended them to be delivered and disposed of."

He concluded:

"It has been stated on oath in this case that there was no market in the United Kingdom for this particular brand of Kentucky tobacco—that the European market for it was Germany and Holland. That may or may not be the fact. If it be, the hardship upon the neutral owners of having to pay freight to the captor is obvious. It has been pointed out in the authorities that sometimes the advantage would be on the side of the cargo and sometimes on the side of the vessel. But 'the possible advantage' or disadvantage of an interruption of the original intended voyage is but an accidental circumstance to which the Court will but slightly attend. It would introduce a labyrinth of minute considerations, through which the Court could not find its way. It would also necessitate, in cases like the present, a close investigation of all the terms, conditions, and circumstances involved in the contractual obligations of the parties, and of their rights and liabilities under foreign municipal law, which this Court has always refused to undertake."

The Prize Court of Ceylon applied the same rule in the case of the *Australia*,[2] where the old principle as stated by Sir Samuel Evans in the *Roland* was referred to with approval as a "well known rule of prize law." In the case of the *Floating Craft of the Deutsches Kohlen Depôt, Port Said*[3] the Prize Court for Egypt refused a demand of the procurator for an order detaining the proceeds of the hiring of certain craft before they came into

[1] Notably in the cases of the *Fortuna* (4 C. Rob. 278) and the *Vrow Anna Catharina* (6 C. Rob. 269).
[2] II Br. & Col. Pr. Cas. 315. [3] *Ibid.*, 439.

the possession of the Prize Court, the claim of the procurator being that the money claimed was equivalent to freight due the ship. Judge Grain adverting to the decision of Sir William Scott in the case of the *Fortuna* that the captor was entitled to freight only when the contract was completed by the captor after the ship was taken possession of by him, observed that in the present case the contract of hiring was complete long before the Prize Court had obtained possession of the craft and hence there was no contract to complete.

Sec. 477. The Same. French Decisions. The French Prize Council adopted a contrary view to that of the British Prize Courts in respect to the right of the captor to proportional freight. In the case of the *Barmbek*,[1] a German vessel bound from Portland, Maine, to Ipswich, England, via Brest, and captured by the French, the minister of marine released the cargo to the English claimants upon payment by them of freight representing the proportion between the distance between Portland and Brest and Portland and Ipswich. Subsequently they claimed before the Prize Council reimbursement for the freight paid, on the ground that the terms of the charter party relative to the carriage of the goods were based on English law according to which freight is due the carrier only when the goods have been carried to their final destination, which in this case was Ipswich, and consequently the French captor which had become substituted in the place of the original carrier had no right to exact, as it had done, payment by the owners of the goods of proportional freight. The claim was rejected, among the *considérants* being a denial of the exactness of the claimants' contention that the captor state was substituted in all the rights and obligations of the carrier; the affirmation that the captor takes the ship as he finds it with all the benefits; that he is not bound by contracts between the shipper, carrier or owner; that there being no general rule of international law in respect to the right of captors to proportional freight and the practice of states being different, each is free to apply its traditional rules; that the French Prize Council was not bound to follow the decision of the English Prize Court in the case of the *Roland;* and that the right of captors to proportional freight had been many times recognized in the past by French prize tribunals (notably in the cases of the *Julius*, Nov. 25, 1870, the *Vorsetzen*, Nov. 2, 1871, and the *Alma*, Dec. 13, 1871).

[1] Fauchille, *Jurispr. Franc.*, pp. 3, 270.

Sec. 478. Claims of British Shipowners Against the Captor of the Ship or Against the Owners of the Cargo. The shipowner may be a national of the captor state, of an allied state, or of a neutral state. Prior to the late war no cases had ever come before the British Prize Court involving claims of British shipowners for freight against captors or seizers of cargoes, such claims having always been those of neutral shipowners. In the latter cases the Prize Court had according to an ancient practice allowed full freight to the neutral carrier on the theory of the incapacity of the vessel to proceed. In the case of the *Juno* [1] the claim of a British shipowner for freight came before the British Prize Court for the first time in 1914. Here certain parcels of German goods were laden shortly before the war on a British ship at Bristol for delivery at Amsterdam for an ultimate German destination. The ship having proceeded on its voyage stopped at Swansea to take on additional cargo and while there war broke out between Germany and Great Britain and the goods were seized and condemned as prize. The shipowners claimed out of the proceeds of the cargo full freight and expenses incurred in connection with the discharge of the goods. The Crown argued that there were no reported cases where a British shipowner had been allowed freight in such cases and he could not in this case rely on the incapacity of the ship to proceed. As the goods had an enemy destination the ship could not lawfully carry the goods thereto; consequently it could not be said that it was the seizure of the cargo which prevented her from carrying them. The shipowners, on the other hand, claimed full freight on the ground that although they had carried the goods only from Bristol to Swansea, the detention of the ship because of its enemy cargo had cost them more than if it had performed the completed voyage. They argued also that under the terms of their contract the freight was due on shipment and according to the practice in the past full freight was allowed to *neutral* shipowners on the principle that capture "was regarded as delivery"; if this was true of neutral shipowners, it ought to be equally true of British shipowners. Sir Samuel Evans adverting to the fact that this was the first instance of a claim by British shipowners against the cargo for freight and that there were no rules of law or decisions to bind or guide the Court said he thought the problem could "be solved without great difficulty by a rational application of fair and equitable considerations," there being no doubt

[1] I Lloyd 177; I Br. & Col. Pr. Cas. 151.

that the Prize Court had a right to exercise equitable jurisdiction.

As to the contention of the claimants based on their contract stipulating for payment at the time of shipment, that was a matter which did not concern the Prize Court. In any case, because of the very facts of the situation the shipowners were incapable of performing the contract. As to the contention that the old rule which allowed full freight to *neutral* shipowners in such cases ought to be applied equally to British shipowners he said the two were not in the same situation. Even before the Declaration of Paris, he pointed out, a neutral vessel had the full right to carry enemy goods to an enemy country, subject to the risk of seizure. In this connection he said:

"Since the Declaration of Paris, and indeed before that, by the practice adopted in the Crimean War, neutral vessels laden with enemy goods could not be prevented from continuing their voyages and so earning their freight except where the goods were contraband, or where the pursuit of the voyage would amount to a breach of blockade—and in these cases no freight would be allowed. With British vessels it is quite otherwise; they must not carry enemy goods, or proceed on voyages for which such goods were shipped. In the present case there was accordingly an 'incapacity to proceed,' attributable not only to the cargo, but also to the ship."

Nevertheless he thought it would not be right to deny the British shipowners in this case all the freight on account of the "incapacity of the ship" when the incapacity took place before the war and the voyage was partly accomplished. He accordingly referred to the Registrar and Merchants the matter of the amount to be allowed and for their guidance laid down the following rule:

"Such a sum is to be allowed for freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (although this is not necessarily conclusive in all cases), to the extent to which the voyage has been made, to the labour and cost expended, or any special charges incurred in respect of the cargo seized before its seizure and unlivery, and to the benefit accruing to the cargo from the carriage on the voyage up to the seizure and unlivery; but no sum is to be allowed in respect of any inconveniences or delay attributable to the state of war, or to the consequent detention and seizure."

He admitted that this was not a very precise rule but he doubted whether any precise rule could be formulated. He held also that the cost of discharging the goods at Swansea should likewise be chargeable to the goods. Regarding the contention of claimants that the detention of the ship at Swansea should be

taken into account and that it would probably amount to the full freight, Sir Samuel said:

"I desire to pronounce as my opinion that no sum ought to be allowed, unless there be some special and exceptional circumstances in respect of any delay or inconvenience which may occur to a ship as the necessary result of her diversion or detention for the purpose of seizing and making unlivery of confiscable enemy cargo. Such things, and their consequent losses, are some of the unfortunate, albeit minor, results of war to which those engaged in shipping have to submit, as other citizens must in other capacities and walks of life."

In the case of the *Tredegar Hall*,[1] a British steamship laden with a cargo of maize which sailed before the outbreak of war from Argentine ports for Hamburg and Emden, was diverted after the outbreak of war by order of the British admiralty, to Weymouth and subsequently to Cork. Upon condemnation of the cargo as good prize the admiralty paid the shipowners full freight for the carriage of the goods from Argentine to Hamburg and Emden. The owners now claimed a large sum for the carriage of the goods from Weymouth to Cork and for seven days' detention of the vessel at Weymouth. Sir Samuel Evans disallowed the claim. Explaining further his decision in the *Juno*, he said:

"I intended to say in the *Juno*—and I think I did say—that no sum ought to be allowed to British shipowners in respect of any delay or inconvenience which might occur to a ship as the result of her diversion or detention for the purpose of seizure, and making the unlivery of confiscable enemy cargo. When I referred to the inconvenience or delay in the last paragraph but four of my judgment, I intended to include any inconvenience or delay caused by the detention or diversion of the vessel from her chartered course. That is made clear, I think, in the final paragraph. In this case nothing happened except the delay and inconvenience which was caused by her diversion in consequence of the war. It is a loss, if it be a loss, to the shipowners as a result of the war, and for which, unfortunately, they cannot have any compensation. It is a loss like the losses which have to be submitted to by other citizens in other capacities and other walks in life, as I have already pointed out in the *Juno*. I think in this case that the owners of the vessel, who have been paid their full freight, have been generously treated. If they had tried to proceed to Hamburg, I do not think it requires a very lively imagination to see what would have happened if the vessel had not been diverted to this country either voluntarily or by the action of his Majesty's cruisers."

The question arose in a new form in the case of the *St. Helena*,[2] where a British vessel laden with a cargo for Hamburg was

[1] II Lloyd 369; I Br. & Col. Pr. Cas. 492.
[2] IV Lloyd 289; I Br. & Col. Pr. Cas. 618.

seized but the cargo was released and the shipowners brought an action in the King's Bench Division for full freight or a sum *pro rata itineris*. The claim for full freight was disallowed on the ground that the voyage had not been completed and for other reasons the claim for the *pro rata* sum was rejected.[1] The shipowners thereupon made their claim before the Prize Court. The cargo owners against whom the shipowners had a lien for the freight contended that the matter was *res judicata*. But the Prize Court held that the matter was not *res judicata* as the action in the King's Bench Division was upon a contract and was decided according to common law principles and not according to equitable principles of prize law under which the shipowners were entitled to claim full freight. As in the case of the *Juno*, the matter was therefore referred to the Registrar to determine the amount, if any, which should be allowed them in respect of full freight. On appeal[2] the Judicial Committee upheld the jurisdiction of the Prize Court in matters of freight but reversed its judgment in respect to the right of the shipowners to full freight, on the ground that the voyage having been abandoned as unlawful before the seizure and all possibility of earning the full freight having been lost, there were no circumstances to support a claim to compensation in lieu of freight. Lord Parker, speaking for the Judicial Committee, said:

"In their Lordships' opinion it is quite clear that, as a matter of contract, no freight was payable. Under the contract between the parties nothing could become due for freight until the ship had performed her part of the bargain by carrying the goods to their port of destination. In order to succeed, therefore, the respondents had to establish that, according to the law administered in a Court of Prize, they were entitled to some compensation in lieu of freight. It is pertinent to enquire on what ground they should be entitled to such compensation in the present case. If the goods had never been seized as prize, they could have claimed nothing for freight. They abandoned the voyage on August 7, long before the seizure. They could not do otherwise, for the war rendered its continuance unlawful. Why should a subsequent seizure of the goods, unlawful as against the neutral owners, subject such owners to a liability from which they would otherwise have been free, or confer on the shipowners rights which these latter would not otherwise have had? Their Lordships' failed to find any satisfactory answer to these difficulties in the arguments advanced or the cases cited on behalf of the respondents. In their opinion compensation in lieu of freight may well be awarded against the captors where, by reason of a seizure *jure belli* which turns out to be unlawful, the ship has been deprived of the opportunity of earning freight which, but for the seizure, it could lawfully have earned. This might, for example, be the case where the ship on which the goods have been carried is a neutral ship, and as

[1] *Supra*, Sec. 56. [2] IV Lloyd 298; II Br. & Col. Pr. Cas. 257.

such entitled to continue the voyage. Again, it may well be that where enemy goods on board either a neutral or British ship are lawfully seized as prize the ship may be entitled to compensation in lieu of freight. In such a case the captors are the gainers from the fact that the ship has brought the goods to the place of seizure. But where, prior to the seizure, the voyage has become unlawful, and all possibility of earning the freight has already been lost, there appears to their Lordships to be nothing for which compensation can be properly awarded. It is no part of the function of the Prize Court to alter the contractual relations between shipowner and cargo owner, and this would be the only result of allowing such compensation."

Although the decision of Sir Samuel Evans in the case of the *Juno* was never directly overruled by the Judicial Committee, the above quoted passages from their Lordships' opinion in the *St. Helena* would seem to be a disapproval of the principle laid down by him. There were, to be sure, differences between the two cases but in both cases the question was whether a British shipowner was entitled to freight where the completion of the voyage had become impossible because it was illegal; Sir Samuel thought he was, whereas the Judicial Committee held otherwise.

Sec. 479. Right of British Shipowner to Freight for Carriage of Goods Released in Default of Condemnation. This question came before Sir Samuel Evans in the case of the *Corsican Prince*,[1] a British ship upon which a cargo of barley had been seized but released without being brought before the Prize Court for adjudication, although it had been sold by order of the Court to prevent its deterioration. The shipowners claimed freight payable out of the proceeds from the sale. Overruling the objection of the cargo owners that the common law courts and not the Prize Court had jurisdiction in a case like this where the property had been restored by the captor without prize adjudication,[2] Sir Samuel Evans thus stated the difference of attitude between the common law courts and the Prize Courts in respect to the allowance of freight:

"The Prize Court has constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo, and have adjudicated upon such claims whether the ship or cargo has been released, and when both ship and cargo have been released; and apparently no action involving questions in similar cases were brought in any common law court.

"And this is obviously for grounds solid in justice and convenient in practice, because the two courts administer two different codes or sys-

[1] II Lloyd 198; I Br. & Col. Pr. Cas. 178.
[2] *Supra*, Sec. 56.

tems of law; the Prize Courts deal with claims in accordance with the law of nations, and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-appearance or non-completion of the contract of affreightment; whereas common law courts would only determine the consequences of the strictly legal contractual obligations of the parties."

Shortly thereafter a similar question came before Sir Samuel in the case of the *Iolo*,[1] a British ship laden with goods shipped before the outbreak of the war, consigned to Hamburg and which were seized after the outbreak of the war, discharged and sold in a British port and without being brought before the Prize Court the proceeds of the sale were released. The shipowners claimed freight payable out of the proceeds. The case differed from that of the *Juno* in that the ship was carrying innocent goods, whereas in the case of the *Juno* the claim was for freight payable out of the proceeds of the sale of goods condemned as prize. Sir Samuel held that the shipowners were entitled to such a sum out of the proceeds for freight as was fair and reasonable in the circumstances, the amount to be calculated in accordance with the principle laid down in the *Juno*. The Registrar to whom the matter was referred allowed the claimants full freight.[2]

The rule here applied in respect to claims of British shipowners would doubtless be equally applicable to allied shipowners.[3]

Sec. 480. Claims of Neutral Shipowners. Generally the claims of neutral shipowners against non-confiscable enemy cargoes carried by them for full or proportional freight were allowed by the Prize Courts, but where the goods were contraband, or where there were special cicumstances which in the opinion of the Court made its allowance inexpedient it was refused. As has been said, it was the practice of the English Prize Courts prior to the Declaration of Paris to accord full freight to neutral ships carrying enemy goods which were seized and the vessel

[1] II Lloyd 336; I Br. & Col. Pr. Cas. 291. [2] II Lloyd 364.

[3] The only case of a claim presented to the British Prize Court by the owners of an allied ship for freight was that of the *Parchim* (IV Lloyd 375; I Br. & Col. Pr. Cas. 579), a Russian vessel, the cargo of which, destined to Holland, was seized as enemy property upon arrival at Plymouth and was condemned as good prize. Sir Samuel Evans held that in strictness the vessel was liable to confiscation for engaging in illegal trading, although the Crown did not ask for this penalty, and consequently the claim of the shipowners for freight must be disallowed. Upon appeal to the Judicial Committee, the judgment of condemnation of the goods was reversed but the disallowance of freight was sustained.

The only claim of an allied shipowner for freight which came before the French Prize Council was the case of the *Narrovian* (Fauchille, *Jurispr. Franc.* 68), an English ship carrying a cargo of wheat the capture of which was held invalid by the Prize Council. Freight was allowed and the decision was upheld on appeal by the Council of State. 28 *Rev. Gén., Jurispr.* 29.

allowed to proceed, this on the principle that it was stopped by the "incapacity of the cargo." The adoption of the Declaration of Paris exempting from capture non-contraband enemy goods under a neutral flag led to the abandonment of this practice, but it was revived during the late war, particularly in consequence of the reprisals measures of Great Britain and France. The original doctrine was applied by the supreme court of New South Wales and on appeal by the Judicial Committee in the case of the *Remonstrant,*[1] a Norwegian vessel from which enemy goods were seized prior to the Reprisals Order of March 11, 1915, and were condemned by the Prize Court. The consignee of the goods was held to be entitled to reimbursement for payments made by him on account of freight and that the master of the ship was entitled to the balance of his freight since he was guilty of no unneutral conduct.[2] After the promulgation of the Reprisals Order of 1915 the old doctrine was applied in its full force. Thus in the case of the *Stigstad,*[3] a Norwegian vessel seized under the Reprisals Order, the cargo of which was required to be discharged in a British port, the Prize Court, and on appeal the Judicial Committee, allowed the shipowners freight out of the proceeds from the sale of the cargo, the amount to be determined by the Registrar in accordance with the rule laid down in the *Juno.* The same conclusion was reached in the similar case of the *Heim.*[4] In the case of the *Katwyk* [5] Sir Samuel Evans allowed some freight in accordance with the principles laid down in the *Juno* to the neutral owners of a ship carrying goods which were innocent at the time she started on her voyage but which had become contraband at the time of seizure, this notwithstanding the fact that the owners might have had business relations with the Krupps of Essen.[6]

The French Prize Council likewise allowed freight to neutral shipowners for the carriage of goods laden before they had been declared contraband of war [7] and where in consequence of the wrongful seizure by the French naval authorities the owners of the ship had been prevented from receiving their freight.[8]

The German Prize Court held that where a neutral ship had

[1] VI Lloyd 329; III Br. & Col. Pr. Cas. 14.
[2] Compare also the case of the *Anastassios Koroneos,* I Br. & Col. Pr. Cas. 519.
[3] V Lloyd 361, 386; II Br. & Col. Pr. Cas. 179; III, *ibid.,* 347.
[4] VIII, *ibid.,* 484; III, *ibid.,* 459. [5] II, *ibid.,* 317; I, *ibid.,* 282.
[6] To the same effect see the *Sörfareren,* IV Lloyd 174, 176; I Br. & Col. Pr. Cas. 589.
[7] The *Fortuna,* Fauchille, *Jurispr. Franc.,* 46.
[8] The *Oranje Nassau, ibid.,* 77.

been seized and its cargo condemned the shipowner was entitled to freight already earned at the time of seizure.[1]

Sec. 481. Disallowance of Freight Where Cargo Consists of Contraband. On the other hand the Prize Courts very often disallowed claims of neutral shipowners for freight, the most usual reason being that the cargoes carried were contraband of war. In the case of the *Jeanne and Other Vessels*,[2] where conditional contraband goods had been trans-shipped from a German vessel to neutral vessels in a neutral port, the shipowners put in a claim for freight. They contended that since they were guilty of no fraudulent devices and the goods were being carried to a neutral port they were entitled to freight earned. Sir Samuel Evans disallowed the claim. He said:

"I think it is clear on all authorities and from the text books, that freight is never paid to neutrals in respect of the carriage of contraband, except as a matter of grace or as a matter of discretion. In the American case of the *Commercen* (1 Wheaton (Amer.) 382) Mr. Wheaton, in the headnote, states the law thus: 'freight is never due to the neutral carrier of contraband'; and on page 394 in his note he says: 'freight and expenses are almost always refused by the British Prize Courts to a carrier of contraband. There is but one case in the books of an exception to this rule, which was of sail cloth carried to Amsterdam the contraband being in a small quantity amongst a variety of other articles.' That was the case of the *Neptunus* (3 C. Rob. 108; 1 Eng. P. C. 263). Later on in America the point was definitely and specifically decided in the case of the *Peterhoff* (5 Wall. Amer. 28), where freight was refused, although knowledge was negatived."

Adverting to the argument of counsel for the claimants that freight ought to be allowed except where there was knowledge of the contraband nature of the cargo (which they alleged was not the case here), Sir Samuel said:

"It is clear from the deliberations of the representatives of the various Powers at the International Naval Conference, held in London in 1908-09, that it was assumed that freight was never payable in respect of contraband."

Nevertheless, the British Prize Court held that although neutral shipowners were not entitled to freight for the carriage of contraband it had a discretionary power to allow freight to innocent shipowners in exceptional circumstances. Sir Henry Duke in so holding in the case of the *Prins der Nederlanden*[3] stated

[1] The *Brage No. 2*, I *Entsch.* 267; Fauchille et De Visscher, *Jurispr. All.* 202.
[2] V Lloyd 293; II Br. & Col. Pr. Cas. 300.
[3] VI Lloyd 424; II Br. & Col. Pr. Cas., 300. See also Sec. 56, *supra*.

that he did not think the decision of Sir Samuel Evans in the case of the *Jeanne* was exactly in point. He thus stated the general rule:

"The general rule is that the carriage of contraband forfeits the right to freight; but there is a higher rule than that, and it is that the Court must do justice. I have to see in this case whether there is any ground of justice, either upon fact or upon presumption, upon which it ought to be held that this shipowner has forfeited his claim to have freight for these goods—that is, has forfeited the right to come to the Court, and to ask the Court, upon recognising his innocence of complicity in a contraband transaction, to direct that he shall receive payment of freight. I put the power of the Court no higher than that. I do not conceive that there is—indeed I conceive that there is not—power in the Court to award freight to a shipowner who is knowingly a party to a contraband transaction. On the other hand, I conceive that there is power in the Court to award freight to a shipowner who unknowingly carries contraband, and who is not a party in intent to a contraband transaction."

On the finding that the shipowner's transactions were entirely innocent and that he had no knowledge of the contraband nature of the cargo and that the captor had derived advantage from the carriage, Sir Henry allowed his claim for freight. On appeal the Judicial Committee [1] approved the judgment of the lower court as to its discretionary power to allow freight in exceptional circumstances for the carriage of contraband goods, but it disagreed with the lower court on its finding that the circumstances in this case justified the allowance of freight. The judgment on this point was accordingly reversed. Their Lordships held that the matter of whether the shipowner was entitled to freight ought not to turn on his ignorance or knowledge of the character of the cargo and still less should proof of his ignorance be treated as a title to a decree for freight, otherwise "the owner of a general ship would rarely lose his freight, for captors could seldom hope to bring such knowledge home to him, considering how numerous and often how small are the separate parcels shipped, and in what haste they are often taken aboard." Their Lordships added:

"In cases of continuous voyage a similar difficulty would arise even for entire cargoes, and such a rule would, in the case of cargoes wholly or mainly contraband, leave no middle term between forfeiture of the ship and release of it with an allowance of freight. It is not too much to require that shipowners should know both the contents of belligerents' proclamations as to contraband and the descriptions of the goods entered in their own manifests. How it might be, if contraband articles were fraudu-

[1] X, *ibid.*, 212; III, *ibid.*, 943.

lently concealed in seemingly innocent packages or disguised by the shippers under a plausible misdescription, need not now be decided. The shipowner always has the remedy in his own hands, if he requires his freight to be prepaid, and the general practice in the late war to do so shows how available such a remedy is."

The Prize Council of France was in many cases unable to allow claims for freight where the claimants were entitled to it, for the reason that different from the British Prize Courts, it had jurisdiction over such claims only when they were accessory to a decision on the question of the validity of the capture.[1] Thus where a neutral ship was diverted to a French port and the contraband cargo seized, after which the vessel was authorized to proceed, the Council was incompetent to pass on the claims of the shipowner for damages or freight. The remedy of the claimant in such a case was petition to the minister of the marine.[2] But where there had been an actual capture and the Prize Council was called upon to judge the question of the validity of the capture, it was competent to hear accessorily thereto claims for freight. In such cases where goods on a neutral vessels were condemned as contraband, the Prize Council refused as did the British Prize Council to allow freight to the shipowner.[3] But where the goods had been released or the owners reimbursed for their value, the Council allowed freight.[4]

Sec. 482. Claims of Interested Parties Other Than Owners. In several cases claims were made by interested parties for freight paid by them in advance to the shippers in order to obtain delivery of the goods. In the case of the *Clan Urquhart,*[5] where goods consigned to a house in Germany, shipped on a British vessel were pledged to British merchants who paid freight to the shipowners, their claim for repayment of the freight out of the goods, which had been condemned, was disallowed by Sir Samuel Evans. The claimants, he thought, were aware that at the time they paid the freight, which was a month after the outbreak of the war, the goods were destined to Germany; they paid it at their own risk and they had no lien or claim against the captors. Their only remedy was to recover from their German customers by suit after the close of the war.

In the case of the *Maningtry,*[6] where goods on a British ship

[1] *Supra,* Sec. 58.
[2] See, among others, the cases of the *Jiul No. 1* (Fauchille, *Jurispr. Franc.* 27) and the *Fortuna, ibid.,* 46.
[3] The *Boeroe, ibid.,* 53.
[4] The *Atlas No. 3,* the council of state overruling the Prize Council, 27 *Rev. Gén.* (1920), *Jurispr.* 6.
[5] III Lloyd 9.
[6] IV Lloyd 202; I Br. & Col. Pr. Cas. 497.

were condemned as enemy property Sir Samuel held that persons who had voluntarily paid the freight for their own purposes were not entitled to reimbursement from the captors, but that when it had been "honestly paid" on condemned cargoes which would have had to bear the expense of freight, if unpaid, they were entitled to reimbursement, if in the circumstances the Court considered it just and equitable. In this case British bankers, holders of the bills of lading, who had innocently paid a portion of the freight in ignorance of the fact that the cargo had already been seized as prize were held to be entitled to reimbursement out of the proceeds of the condemned cargo. But in the case of the *Bilbster*,[1] decided the same day, the same claimants were denied reimbursement of freight both as against the shipowners and out of the proceeds of the condemned cargo. Likewise in the case of the *Kwango*[2] Sir Samuel Evans allowed a claim of British pledgees for the repayment of freight out of the proceeds of a cargo carried on a Belgian ship and condemned as enemy property.

In the case of the *Anastassios Koroneos*,[3] where before the outbreak of the war goods were shipped by Turkish merchants on a German vessel consigned to sales agents at Malta, but which in consequence of the outbreak of war deviated to a neutral port where the goods were trans-shipped and forwarded by a Greek steamer to Malta and subsequently condemned, the Prize Court of Malta held that while the owners of the Greek ship were entitled to freight for the carriage of the goods to Malta, their claim for freight paid to the German shipowners in order to obtain the release of the goods, could not be allowed. No claim whatsoever, said the Court, for disbursements made with regard to enemy goods could be recovered in prize proceedings. The judge added:

"I am aware that a certain relaxation of this principle is now admitted in favour of British or non-enemy bankers or subjects who disburse money to obtain goods on which they have a lien, but the present claim is *prima facie* an attempt on the part of a neutral company to save, not only the freight due to an enemy ship, but to give the enemy a sum over and above the amount due.

"The National Steam Navigation Co. of Greece had no lien on the goods, and no interest in the matter except that it was entrusted by the owner of the goods, or by the Deutsche Levante Linie, to carry out the contract which that company was unable to perform."

[1] IV Lloyd 156; I, *ibid.*, 507 (note).
[2] II, *ibid.*, 194; I, *ibid.*, 519.
[3] II, *ibid.*, 194; I, *ibid.*, 519.

II

Claims for Indemnities on Account of Seizures in Neutral Waters

Sec. 483. Claims of Owners. Two classes of claims under this head came before the Prize Courts during the late war: (1) claims by the owners of or other persons interested in the ship or cargo, and (2) claims by neutral governments for damages on account of the infringement of their neutrality. No claims of the first class appear to have ever been allowed in any case. Only two such claims appear to have come before the German Prize Courts but they were disallowed for the reason that they had not been presented within the period prescribed,[1] or for the reason that the seizure was held not to have actually taken place in neutral waters.[2]

In the case of the *Bangor*[3] Sir Samuel Evans disallowed a claim for restitution and for costs made by the owners of a vessel flying a neutral flag which was captured in the territorial waters of Chile (at least the Court was willing to assume that it was captured in such waters) while engaged in carrying coal and other supplies to German warships. The owners of the vessel, he said, could not rely upon the fact of capture in neutral waters in support of their claim that the capture was illegal and that they were therefore entitled to restitution and costs. Objection to capture in neutral waters, said Sir Samuel, could only be made by the neutral power whose rights had been violated by the capture. "No proposition in international law," he added, "is clearer or more surely established, than that a capture within the territorial waters of a neutral is, as between enemy belligerents, for all purposes rightful; and that it is only by the neutral State concerned that the legal validity of the capture can be questioned. It can only be declared void as to the neutral State and not as to the enemy."[4] Regarding the contention of the claimants that this well-established rule of international law had been modified by the 13th Hague Convention of 1907, Sir Samuel said

[1] The *Ambiorix* (I *Entsch.* 170; Fauchille et De Visscher, *Jurispr. All.* 131. In this case the Court also emphasized that it was not proven that the seizure had actually taken place in neutral waters.
[2] The *Guldborg* (*ibid.*, 280; *ibid.*, 215).
[3] V Lloyd 308; II Br. & Col. Pr. Cas. 206.
[4] Sir Samuel cited in this connection, among others, the cases of the *Anne* (3 Wheat. 435), the *Sir William Peel* (5 Wall. 517), and the *Adela* (6 Wall. 266).

it was clear that this Convention dealt only with the relations between belligerent and neutral powers, and not with questions arising between belligerents; it did not herefore affect the rule relating to capture in the territorial waters of a neutral State, as between two belligerent powers, when the neutral State did not itself intervene.

Sec. 484. Claims of Neutral Governments. Claims of the second type, namely those made by neutral powers for damages on account of seizures made in their territorial waters, were considered at length by the British Prize Court and on appeal by the Judicial Committee, in several cases. In the case of the *Düsseldorf*[1] Lord Sterndale released an enemy vessel which had been captured within the territorial waters of a neutral State (Norway) but refused to allow a claim of the neutral government for damages and costs for the violation of its neutrality, for the reason that the captor had merely miscalculated the distance from the Norwegian shore and that there had been no intentional violation of neutral rights. Counsel for the claimant maintained that the Norwegian government had not only to protect its own territory against violations of neutrality but that it might be held responsible to belligerents whose ships had been seized within its waters. Consequently, in order to protect itself, it must ask for a decision on the question of whether it was entitled to damages and costs. Lord Sterndale, relying on the decision of Lord Stowell in the case of the *Twee Gebroeders*,[2] where it was held that damages and costs were not allowable to the neutral government when the capture took place in its waters as a result of misapprehension and mistake, denied the claim. The captor in this case, he thought, instead of deliberately violating the neutrality of Norway attempted to respect it but unfortunately made the mistake of calculating the three mile distance from the mainland instead of from an island. Upon appeal to the Judicial Committee, the decision of Lord Sterndale was reversed in part, their Lordships holding that while the Norwegian government was not entitled to anything in the nature of damages for the wrongful seizure of the vessel in its waters, nor for the costs and fees of the marshal of the Prize Court in connection with the custody of the vessel, it was entitled to be reimbursed for the costs and expenses incurred in connection with the delivery of the ship in England and the taking of it

[1] IX Lloyd 1, 12; III Br. & Col. Pr. Cas. 466, 664.
[2] 3 C. Rob. 162 (1800).

back to Norway. Lord Sumner, speaking for the Judicial Committee, reaffirmed what had been said in earlier cases that as against the enemy owners the capture was good and the "claim of territory," as it is called, was one which was available only to the territorial sovereign; that is, it was in this case a matter entirely between the British and Norwegian governments. There was no doubt, he said, that the enemy owner was entitled to have restitution of his vessel on behalf of the government of Norway and had the naval officer's error been brought to the attention of the British government before prize proceedings had been instituted the vessel would undoubtedly have been promptly returned to Norway with suitable expressions of regret. This not having been done the Norwegian government was entitled to physical redelivery of the vessel at the expense of the captor and not that of Norway. A somewhat similar case was that of the *Valeria*,[1] another German vessel captured by a British armed trawler in the territorial waters of Norway and which on account of the inability of the captor to take it in because of bad weather was sunk by gunfire. On a claim by the Norwegian government for restitution of the value of the vessel and for damages and costs, the Prize Court held that the captor having honestly believed that he was outside the territorial waters of Norway when the capture was made, the violation of neutrality was unintentional and consequently the claim of the Norwegian government for restitution in value must be denied, although it was admitted that the vessel would have had to be restored had it not been sunk. For the same reason it was held that the Norwegian government was not entitled to anything in the nature of pecuniary compensation or costs. The claimants relied on Article 3 of the 13th Hague Convention which requires a captor to liberate, on demand of a neutral power, a prize made in its territorial waters. They admitted that where the seizure was justifiable and made *jure belli* and the prize was subsequently lost there was no obligation to make restitution in value but they contended that the seizure in this case was not *jure belli* but was analogous to the act of an outlaw or trespasser. Sir Henry Duke held that Article 3 of the Hague Convention did not deal with a case such as this where the question was not whether the vessel should be restored but whether when it has been destroyed there is an obligation to make restitution in value to the neutral power. The authority of various text writers and decisions was quoted in support of

[1] IX Lloyd 23; III Br. & Col. Pr. Cas. 702.

the view that the obligation was merely to restore to the neutral the ship so far as possible in the condition in which it was at the time of seizure and not its value when it was lost or destroyed. The analogy of the common law relied upon by the claimants, of tortious possession, failed, he thought, in that the wrongdoer in such a case has no lawful authority to appropriate chattels which are not his own, whereas the commander of a belligerent warship has such authority and is not liable for damages if he exercises his authority in good faith. An unintentional encroachment by a captor upon the territorial waters of a neutral power gives that power no claim on behalf of enemy owners which, under international law, neutral owners of a vessel seized in error, would not possess. As to the claim of the neutral government for damages for violation of its sovereignty when the offence was unintentional, that was not a wrong which was cognizable in any existing court of law. Damages in such cases had never been allowed except where the capture was made "in wilful abuse of belligerent rights" (the *Anna,* 5 C. Rob. 373). The present case came within the authority of the *Twee Gebroeders,* where claims for damages were disallowed a neutral government when the seizure was the result of error or misapprehension.

The judgment of Sir Henry Duke was affirmed by the Judicial Committee.[1] Lord Sumner adverting to the contention of the appellants that the captors having committed a wrong in seizing the ship, ought, since they could not, owing to her destruction, make *restitutio in integrum,* restore her *in specie,* stated that the contention was tantamount to the argument that the captors were insurers of the vessel "against all risks and in all events whatsoever for the benefit of the neutral sovereign." Referring also to a passage in their Lordships' opinion in the case of the *Düsseldorf* (relied upon by the claimants) that simple release of the ship to the neutral sovereign might be inadequate redress and that the true claim of the appellant was for *restitutio in integrum,* Lord Sumner said:

"From this the conclusion was drawn that *restitutio in integrum* involved the payment of money, in case of the fortuitous loss of the ship. Their Lordships do not agree. No such consideration arose in the *Düsseldorf.* There the ship existed *in specie* and the right of the claimants to her release was uncontested. What was in debate was, whether it was sufficient to place the ship at the disposal of the Norwegian government in a British port, or whether, as the equivalent of returning her to the waters from which she had been taken, the cost of transporting her from England to

[1] IX, *ibid.,* 41; III, *ibid.,* 834.

Norway should be paid. If this were not done, however venial and trivial the captors' original error might have been, the government of Norway might be put to unmerited inconvenience and expense by reason of an act of which they had a right to complain. This was the connection in which the expression *restitutio in integrum* was used. The case had no analogy to the technical *restitutio in integrum* of Roman law, nor to the measure of damages for injury to property wilfully or carelessly inflicted, nor were such matters considered. The plain fact is that no money can restore this ship, and to claim money, with which to buy another ship, or as a *solatium* for her loss, is to shift the ground of the claim from restitution to reparation."

He further observed:

"It may be right that such claims should be encouraged, so that all sense of grievance in neutral Sovereigns may be peacefully and regularly removed, but their Lordships, however disposed to the fullest liberality of treatment, must be guided by settled rules and decisions. Anything in excess of this must be sought, if at all, through diplomatic channels. The government of Norway had no property or interest in this ship; they had no possession of her, nor, so far as appears, have they come under any liability or incurred any expenses, other than costs, in respect of her capture. Alike in vindication of their Sovereigns' territorial right and of his high obligations of impartiality as a neutral in time of war, they demand on his behalf that the steps which the captors took should be retraced, that what was done should be undone, and that the belligerent should retain no advantage from the captors' mistaken action. This is His Norwegian Majesty's right, but compensation in money for the loss of the ship under circumstances such as these can only be asserted in the interest of the owners of the vessel. It is not as though Great Britain had profited by what happened. If the Norwegian government be really entitled to recover money, no one is entitled to inquire into the use to which they may choose to put it; but, for the purpose of testing the right; it is germane to ask in what title that money would be recovered. Even though it is measured and described as the value of the vessel, it is money still, and would be recovered only on behalf of the German shipowners, who have no rights in the matter."

Lord Sumner concluded that the rights of the territorial sovereign in a case like this, where he was vindicating neither ownership nor possession but his "claims of territory" only, were fully satisfied (in the absence of misconduct) by the restitution of the ship, if it was still in existence; he had no right to another ship or the means of buying one.

"In the present case the capture was within territorial waters, and the only wrong that can be vindicated is the wrong to the sovereignty of His Majesty the King of Norway. Whether indemnity be an apt term or not in the case of captures, it is at any rate plain that it is a term which would preclude the appellant from recovering anything in respect of the proprietary interest in the ship. Restitution of the vessel in money would either

leave in the hands of the Norwegian government a profit on the whole transaction, which is a contradiction of the whole idea of indemnity, or would constitute them agents or trustees for the German owners, who, on receipt of the money, would be recompensed for that which was no wrong to them, so that again the principle of indemnity would be departed from."

Sec. 485. The Same (Continued). Case of the "Pellworm" and Other Vessels. A somewhat similar question came before the Prize Court in 1919 and on appeal before the Judicial Committee, in the case of the *Pellworm and Other Vessels*,[1] where a claim for compensation and damages was made by the Dutch government for the capture in Dutch territorial waters by British warships of several German vessels. When sighted by the captor the vessels were outside the territorial waters but after hauling down their flags following a signal to stop, they persisted in their endeavors to escape and were not finally seized until they were within three miles of the Dutch coast. Lord Sterndale held that while the formal act of capture took place in Dutch waters there was no intentional violation of the neutrality of the country and consequently the Dutch government was not entitled to compensation, damages, or costs, though of course the vessels must be released. Meanwhile, the vessels were requisitioned by the Crown and while under requisition two of them were sunk by German submarines. Upon further consideration, the Dutch government now put in a claim for the restitution of the remaining vessels and the value of those sunk and compensation for their use while under requisition. This claim was likewise dismissed on the ground that the seizure did not create in the neutral government any proprietary right since it had put forward the claim as an assertion of its own sovereignty and on behalf of the enemy owners to whom, if the ships or their value were restored, they would be handed over by the neutral government and that since the requisition orders vested in the Crown the property in the ships, the Dutch government was not entitled to compensation for their use.

As to the claim of the Dutch government for restitution of the vessels or their value Lord Sterndale said:

"The case depends mainly, I think, upon the question whether a neutral State, claiming a vessel captured in its territorial waters, claims in respect of an interest of its own, or solely in assertion of its sovereignty and of the rights of the disseized owner. If the seizure creates a proprietary right

[1] IX Lloyd 147: III Br. & Col. Pr. Cas. 702. See also as to this case, Secs. 76, 167, 169, *supra*.

in the ship on the part of the neutral Sovereign, that right must be safeguarded by the Court. If the only proprietary right at the time of the seizure and of the claim in prize is that of the owner, cessor of that right pending the suit, prevents any decree of restitution for the use of the owner. The only encroachment which was made upon the rights of the owner by the seizure here in question was the subtraction from them of an inchoate right of prize on the part of the captor. Nothing done then or later by captor or owner seems of itself to found a claim of interest in the neutral State whose territory was violated in the seizures."

Regarding the claim for compensation for the use of the vessels while under requisition he held that the intent of the orders under which they were requisitioned was that they should become the property of the Crown; and so vested in the Crown the sinking of some of them was immaterial. The Dutch government having no proprietary interest of its own in the ships could not maintain a claim for compensation for their use while under requisition by the British government.

Upon appeal the Judicial Committee [1] affirmed the judgment of the Prize Court that the act of capture took place in Dutch waters and that the Dutch government was not entitled to damages because of the seizures therein, since there was no intentional misconduct on the part of the captors, but it reversed that part of the judgment which held that the Dutch government was not entitled to the restitution of the ships undestroyed and the value of those which had been sunk by the enemy. Lord Sumner speaking for the Judicial Committee agreed with the judgment of the lower court that the Dutch government had no proprietary interest in the ships—that a claim by a sovereign in virtue of his violated rights was the antithesis of a property claim—and it could not assert a claim merely on behalf of or for the benefit of the owners. The remedy for seizing a prize in neutral waters, without justification, was restoration as honorable amends to the affronted neutral. But the neutral could not ask and a court of prize could not grant a money penalty where no intentional wrong had been done by a belligerent. But their Lordships did not think this principle was applicable in the present case for the following reason:

"The ships were requisitioned by the Admiralty for the use of His Majesty, but *ex hypothesi* the requisition operated on something which never should have been brought into the custody of the Prize Court at all. Had it not been for the requisitioning, they would have been restored by decree of the Court. It is true that there is no claim for compensation in

[1] IX Lloyd 170; III Br. & Col. Pr. Cas. 1053.

respect of the loss, as such, but the requisitioning was ordered at the instance of the Crown, and the Crown parted with the custody of them in accordance with the regular practice. Thereafter the ships were represented for all ordinary purposes by their appraised values. If a requisitioned ship is condemned, the undertaking to bring her appraised value into Court fails, since the Crown is not bound to pay for her; if she is not condemned, the money is brought into Court and paid to the party entitled to a release of the ship. If the Court were to refuse to release the appraised values in this case when it would have released the ships, if they had remained in the marshal's custody, the result would be that the Dutch government's right to restoration would be defeated merely as a consequence of the British government's exercise of the right to requisition, and the British government's obligation to bring the appraised values into Court would cease to be performable. As it is, although the ships are lost there is something to restore, namely, the money which represents them. In their Lordships' opinion this consideration must prevail. It is not a sufficient objection to say that the Dutch government have no proprietary interest in money, or that they would recover money only as trustees for or for the benefit of ex-enemy owners. Trustees in strictness they are not, but, even if they were, this would in their Lordships' opinion be less incongruous with principle and more consistent with international amity than that the same law, which requires the return of a prize wrongly captured, should justify the retention of the sum, which is to be deemed to be in Court as representing it. If the prospect of the return of the restored ships to their ex-enemy owners does not prevent their restoration to the neutral government, no different result would follow from the prospect that the money, when restored, will be handed over likewise. It follows that His Majesty's government ought to return to the waters of Holland the vessels which survive, let the present rights of property or possesion be what they may; and ought to do so free of expense to the government of the Queen of the Netherlands, and that the like obligation to return applies to the appraised values, which otherwise would be a profit growing out of their own wrong."

III

Determination of the Amount of the Indemnity. Indirect Damages

Sec. 486. British Practice. Where an indemnity representing the value of a ship or goods requisitioned or destroyed or for damages is allowed, what principle or principles shall be applied in determining such value or damages? The decisions of the British Prize Courts rarely laid down any general principles or rules governing assessments of this kind, for the reason that according to British Prize Court procedure appraisals are made by other authorities than the Prize Court, although by order of the Prize Court. Order XI of the Prize Court Rules of 1914 as amended by the Order in Council of April 29, 1915, authorizes

the judge of the Prize Court to order a ship or goods to be appraised and sold at any time on account of its condition, or upon application of a claimant, on or after condemnation. In such case the appraisement and sale shall be effected by the marshal under the authority of a commission.[1] By order XXIX the Judge of the Prize Court may in a case for the condemnation of a ship in respect of which no final decree has been made, if it is made to appear to him that the Lords of the Admiralty desire to requisition the ship and there is reason to believe that it is entitled to be released, order the ship to be appraised. Where a ship has been requisitioned under the provisions of this order, whether or not an appraisement has been made, any party may apply to the Court to fix the amount to be paid by the Crown. Upon reference to the Registrar, his appraisement may be reviewed by the Court.

By Order XXX the Prize Court is vested with the power to determine the amount of salvage to which those rendering salvage services may be entitled.[2]

By Order XVII the Court is authorized to refer the assessment of damages, the taking of accounts or any other matter which it may think proper to the Registrar either alone or assisted by one or more merchants or other assessors.[3] Their report is submitted to the Court for approval. Upon objection by the claimants to the report of the Registrar, the Court hears the objection and approves or disapproves it. In the cases referred to above where claims for damages, expenses, etc., were made, the Court uniformly referred the matter of the assessment of the amount to the Registrar and his determination was usually confirmed by the Prize Court. Sometimes the Crown and the claimant reached an agreement to refer the matter to the Registrar, independently of any order by the prize Court.[4]

[1] Forms of commission and bills of sale may be found in the Prize Court Rules, 1914, pp. 56-57. The form of commission of appraisement and sale requires the marshal to choose one or more "experienced person or persons" to appraise the same according to the true value thereof and upon a certificate of such value to cause the ship or goods to be sold at public auction for the highest price, not under the appraised value thereof, that can be obtained for the same.

[2] As to the several purposes for which appraisements may be made under the Prize Court Rules of 1914, see the case of the *Consul Olsson*, cited below.

[3] In the case of the *Indianic* (VIII Lloyd 170), Sir Samuel Evans directed that assessment of the value of certain machinery captured on the vessel should be made by two appraisers, one to be appointed by the marshal and the other by the claimants, and that in case of disagreement it should be settled by an umpire to be chosen by the two appraisers or, in case they were unable to agree, to be chosen by the Court.

[4] See, for example, the *Germania* (IV Lloyd 261).

A case of reference to the Registrar of the assessment of the value of a German vessel seized in a port of New South Wales at the outbreak of war and ordered to be detained and which the admiralty desired to requisition was afforded by the *Germania*.[1] Concerning the procedure it is stated in the argument that:

"As the parties were unable to agree upon a figure for the value of the vessel a reference to the registrar was made in order to fix the amount to be paid into Court. The reference was held in August, 1915. The only witness called on behalf of the Crown was Mr. Thomas Luthwaite Grainger, a certificated marine surveyor, who valued the *Germania* at 20,050 pounds, excluding the value of consumable stores and provisions on board. After the case for the Crown was closed, and the master had given evidence, application was made by counsel for the appellants for an adjournment until the end of the war to enable them to obtain evidence as to the original cost, insurance, age, value and other material matters which at that time it was impossible for them to give, as the details were all in Germany. The application was resisted by the Crown, and the registrar decided that the reference must go on with such evidence as counsel for the appellants was then prepared to adduce. Counsel for the appellants thereupon stated that he was not in a position to offer any further evidence. The reference stood adjourned until August 23, 1915, and by request of the parties further stood over until December 9, 10, and 13, 1915, when counsel addressed the registrar, who reported to the Court on February 10, 1916, and adopted as determining the value of the vessel the figures given in evidence by Mr. Grainger.

"On March 1, 1916, notice of motion was served on behalf of the appellants claiming that in respect of the value of the vessel the registrar's report should not be confirmed.

"The motion came on for hearing on April 10, 1916, when the Chief Justice confirmed the report of the registrar."

The refusal of the Registrar, confirmed by the Prize Court, to adjourn the proceedings until the end of the war was upheld on appeal by the Judicial Committee.

The case of the *Consul Olsson* [2] involved the question whether an appraisement by the Registrar and Merchants upon order of the Court, without notice to the claimants, of neutral goods which had been requisitioned by the British Admiralty and which did not take into account the real value of the goods, was final and conclusive.

"The goods in question, consisting of phosphates, had been appraised merely as a cargo to be used for fertilising purposes, without taking into account the urgent demand for phosphates in the manufacture of munitions of war. The claimants therefore contended that the appraisement had proceeded on an erroneous basis; and they asked the Court for a sum representing the real value."

[1] VII Lloyd 221 (Privy Council).
[2] IX Lloyd 340; III Br. & Col. Pr. Cas. 528.

Sir Henry Duke rejected the contention of the Crown that such appraisement was final and ordered a new appraisal of the actual value of the goods. After a statement of the facts Sir Henry said:

"The proceedings for appraisement were not consented to or acquiesced in by the claimants so as to bind them if they are not otherwise bound. They had no notice of the application for appraisement. The appraisement was not made in the ordinary course of prize procedure, either to enable the Court to determine upon a reserve prize for a sale, or to fix bail for a release, or to settle the amount of security in a prize salvage claim. Evidence was given before me further as to the basis of the appraisement. The cargo was shown to have been valued merely as a cargo of phosphates lying and stored of in an English port for which no buyer was in view and which must await a buyer under the then existing conditions of the England trade in phosphates for the manufacture of fertilisers. The valuation took no account of the Swedish demand, naturally, and perhaps necessarily, but it also took no account of the urgent demand there then was in England for phosphates for the manufacture of munitions of war."

Following a review of the earlier decisions and practice of the successive naval prize acts since the 18th century he concluded:

"Having regard to the manner in which the legislature and the Courts have dealt with the subject of appraisement in past times, and also to the terms of the existing rules, I am unable to accept the contention that the return to a commission of appraisement has the invariable effect of finally determining for all purposes the value of the subject-matter appraised."

"The actual value of the cargo now in question must be ascertained by the Court, if it cannot be agreed, and the claimants must receive any sum by which the amount may prove to exceed the sum paid into the Court."

Sec. 487. German Jurisprudence. The German Prize Courts were frequently called upon to determine the value of ships and goods, destroyed by submarines, when indemnities were allowed the owners. Unlike the British Prize Courts, they appraised themselves in the first instance the value of the property and laid down the principles to be applied in determining the amount to be awarded. As to the date at which the value and price should be calculated they uniformly held that it was the value or price of the property at the moment of seizure or destruction rather than that at some subsequent date, for example, the date of adjudication or restitution.[1] As to the place at which

[1] See, among others, the cases of the *Zaanstroom* (I *Entsch.* 118; Fauchille et De Visscher 97); the *Batavier V* (F. et De V. 90), the *Kiew* (I *Entsch.* 241; F. et De V. 162); the *Brage* (I *Entsch.* 227; F. et De V. 174) and the *Thorsten No. 2* (I *Entsch.* 253; F. et De V. 192).

the value of the goods must be calculated the German Prize Courts generally fixed the value at that which they had at the place where they were seized, or if captured at sea, the current price at the place of destination. Occasionally, however, where exceptional circumstances justified a different rule the general principle was departed from.[1]

As to the basis of calculation the Prize Courts, when the claimants produced invoices of the goods, accepted the price indicated therein as the amount to be allowed,[2] but frequently invoices were lacking or did not afford a sufficient basis for determining the price or value, in which case the Prize Court distinguished between claimants who would have consumed the goods had they not been seized or destroyed and those who would have sold them.[3] The fact that the price of the goods underwent an increase subsequent to seizure and before adjudication was not taken into consideration.[4] Nor was the price current in the German market, when the destination of the goods seized was that of some other country.[5] As to the currency in which indemnities when allowed were to be paid, the German Prize Courts invariably held that it was German money at the current value on the day of seizure, destruction or injury.[6]

Sec. 488. French Jurisprudence. The French Prize Council likewise adopted the rule that it was the value or price of the goods at the date of seizure, requisition or loss that must be considered and that the amount allowed must be French money at its value at the same date.[7] Where innocent goods were sold at public auction owing to their perishable nature the claimants were awarded only the proceeds of the sale, from which was deducted the expense of the sale [8] and the same rule

[1] See, among others, the *Brage* (*supra*), the *Helicon No. 2* (I *Entsch.* 160, F. et De V. 313), the *Lestris No. 2* (I *Entsch.* 207) and the *Indrani* (I *Entsch.* 95; F. et De V. 74).

[2] For example, the *Morsö* (I *Entsch.* 41), the *Brage No. 1* (*supra*), and the *John Wilson* (I *Entsch.* 326).

[3] The *Morsö* (*supra*), the *Gelderland* (II *Entsch.* 211) and the *Indrani* (*supra*).

[4] The *Kiew* (*supra*).

[5] The *Thorsten No. 2* (*supra*).

[6] The *Brage No. 1* (*supra*), the *Trudvang* (I *Entsch.* 276) and the *Helien No. 2* (*ibid.*, 411).

[7] The *Nieuw Amsterdam* (Fauchille, *Jurispr. Franc.*, 14), the *Czar Nicolai II* (*ibid.*, 10), and others.

[8] The *Jiul* (*ibid.*, 26) and the *Eir No. 1* (*ibid.*, 88). In exceptional circumstances the expense of the sale was not deducted, as, for example, where the captor was unable to prove that the goods (conditional contraband) were destined to the armed forces or public authorities of the enemy, but which had been sold in the meantime. The *Ogliastra* (*ibid.* 82). On the other hand, sometimes not only was the expense of the sale deducted but also the cost of conservation between the date of seizure and the sale. The *Grao No. 1* (*ibid.*, 228).

was applied in the case of the sale of innocent goods which do not appear to have been perishable and of cargoes requisitioned by the French authorities, provided the requisition value was not inferior to the invoice price or that of the real value.[1] In exceptional cases where sales had been made of goods the seizure of which was held to be invalid, the French Prize Council admitted that the proceeds of the sale were an insufficient indemnity, for example where the intrinsic value of the goods at the time they were seized, because of Italian decrees then in force prohibiting re-exportation of the goods, was inferior to the value at the port of destination at the time they would have arrived but for the wrongful seizure.[2] In the case of the *Insulinde* [3] the Prize Council was called upon to decide whether in determining the amount of indemnity to be paid the claimants for a cargo of rubber destined to Rotterdam and the seizure of which at Marseilles had been held invalid, the high price of rubber due to the demand created by the war should be taken into consideration. The determination of the normal price at Marseilles and Rotterdam at the date of the beginning of the voyage had been referred to an expert who was also requested to give his opinion as to the effect of the war on the prices at both ports. The claimants appealed from his decision on the ground that he had not taken into account the value of the goods at Rotterdam but had based his finding solely on the current price at London which, by reason of the superabundance of rubber in the London market, was considerably inferior to that at Rotterdam. The Prize Council, however, rejected their contention and held that if in consequence of war and solely in consequence thereof, the price of rubber underwent a high increase, the captor was not bound "to bear this increase due to an event of *force majeure*" and especially when, as in this case, it was due to the geographical situation of the country of importation which had become a source of supply for an adjacent enemy country.

Sec. 489. Indirect Damages. In several cases the German Prize Courts pronounced emphatically against claims for indirect or remote damages. Thus where damages in a lump sum were allowed for the wrongful seizure and detention of a Dutch fishing vessel the claim for a sum to cover the profits from a prospective catch during the period of detention was disallowed.[4]

[1] The *Atlas No. 1* (*ibid.*, 39), the *Karimata* (*ibid.*, 62) and the *Kambangan* (*ibid.*, 102) and others.
[2] The *Apollonia* (*ibid.*, 66). [3] *Ibid.*, 21, 128.
[4] The *Sydney Albert* (I *Entsch.* 62, Fauchille et De Yisscher, 43).

Article 8 of the Prize Ordinance, on which the claimant relied, said the Court, laid down no general principle according to which the amount of the indemnity should be determined in the case of an unjustifiable seizure. This Article was an almost literal reproduction of Article 64 of the Declaration of London. It appeared from the General Report annexed thereto that the question was raised as to whether a distinction should be made between direct and indirect damages to ships and goods and the conclusion reached was that it would be better to leave to the Prize Court the power to determine the amount of the indemnity according to the varying circumstances, rather than lay down in advance minute rules governing the matter. According to international practice as shown in numerous decisions since that of the Geneva Tribunal in the *Alabama* case, claims for damages which have only an indirect relation with the acts causing the damage, and especially those for future profits are more or less hypothetical. This was no less true of such claims before the Prize Courts. During the deliberations of the London Naval Conference the German delegation, it was added, insisted on this view and it was not contradicted by any one.[1]

Both the German and British Prize Courts applied the rule of proximate cause and refused to allow damages where the effect was not directly due to the act of the naval authorities or where the loss had no relation to the event which caused the damage.[2]

IV

Claims for Interest

Sec. 490. British Decisions. In addition to damages Prize Courts sometimes allow interest, especially where the seizure

[1] A similar claim was made in the case of the *Liesbeth Betty* (I *Entsch.* 166; Fauchille et De Visscher 118), and was disposed of in the same way. To the same effect see also the *Gamma* (II *Entsch.* 185) and the *Lestris No. 1* (*ibid.*, 396).

[2] See notably the cases of the *Helicon No. 2* (I *Entsch.* 411; F. et De V. 313) and the *Elida* (I *Entsch.* 75). Nevertheless the British Prize Court, and on appeal the Judicial Committee, allowed compensation to the owner of neutral vessels, one of which had been injured and the other sunk, not by the British forces but by a German submarine, because they had been diverted by the British captor, not for the purpose of search, and without justifiable cause and compelled to pass through the German war zone. The *Bernisse* and the *Elve* (IX Lloyd 243, 256; III Br. & Col. Pr. Cas. 517, 771). The Prize Court of Egypt allowed damages for the loss and deterioration by fire of cargo which, it held, had been illegally required to be discharged into a customs warehouse, but the decision was reversed by the Judicial Committee. The *Südmark* (VI Lloyd 352).

or detention was held to be unjustifiable or the captor has had the use of the proceeds of a sale for a period before they were restored to the claimant.

In the case of the *Kronprins Gustaf Adolf and Other Vessels*,[1] where goods of a contraband nature had been seized on board several neutral vessels but were subsequently released to the claimants, Sir Samuel Evans refused to allow damages since the circumstances were held to establish probable cause justifying the seizure,[2] but he expressed regret that the claimants had suffered in consequence a loss, and deeming it right, having regard to all the circumstances, that he should do something to mitigate their loss to some extent he allowed the costs incurred by them after a certain date and interest on the value of the goods sold and detained after the same date. Some of the goods had been sold by interlocutory orders long before the hearing. As to these goods, Sir Samuel said he did not think the Crown ought to have the advantage which might accrue from the use of the proceeds. He accordingly ordered payment of interest to the claimants on the net proceeds of the sale from the date of the receipt thereof up to the date of release, to be calculated at the rate of 5 per cent per annum.

Lord Sterndale in the case of the *Hallingdal*[3] interpreted Sir Samuel's judgment as not being inconsistent with the general practice, which was to refuse interest when goods were released. In this case a cargo of conditional contraband had been seized on a neutral ship and subsequently sold by the marshal of the Court for nearly £26,000. The case was not brought to trial until three years after the sale of the goods, for the reason that the Crown did not wish to disclose the fact that it had discovered what was believed to be the German government code. The owners claimed interest on the proceeds of the sale which the Crown had held for three years and they based their claim on the decision of Sir Samuel Evans in the *Kronprins Gustaf Adolf* that the Crown ought not to have the advantage which might accrue from the use of the proceeds. Although the situations of the claimants in the two cases appear to have been identical, Lord Sterndale thought the circumstances in the latter case were special and did not exist in the present case. He accordingly dismissed the claim. Comparing the two cases Lord Sterndale said:

[1] VI Lloyd 395; III Br. & Col. Pr. Cas. 326.
[2] See *supra*, Secs. 396, 466.
[3] VIII Lloyd 395; III Br. & Col. Pr. Cas. 326.

"I confess that some of the language used in the *Kronprins Gustaf Adolf* seems to show that the late President meant to lay down a rule that wherever the Crown had the benefit of the money they ought to pay interest to the claimants when an order for release was made. I do not, however, think that he did intend to lay that down as a general rule, and I cannot see that it is any way consistent with the numbers of orders made for the release of goods without payment of interest. The learned President certainly thought in the *Kronprins Gustaf Adolf* that the Crown had pursued the case further than they ought to have done, but it was not on that ground that he gave interest. I do not think that he gave interest by way of damages, but he gave interest because he thought that in all the circumstances of the case there was such a hardship upon claimants that he ought to do something to mitigate it, and he mitigated it by giving them interest on the money. It is by no means clear that the claimants here may not be in a very much better position by the sale of these goods with the proceeds paid into Court than they would have been in otherwise. It does not follow that if the goods had been retained they would necessarily have been worth as much when released as at the time of seizure.

"In this case the question whether the goods ought to be released was a difficult question, which the Crown had a perfect right to have investigated by the Court, and I can see no reason why the claimants should be in a better position than they would be in if the goods had still remained in specie. They would then have no claim for compensation, although they might have suffered loss. Unless it be laid down as a general principle that, wherever goods are sold and the money comes into the hands of the Crown, and an order for release is made, the claimants are to have interest on the money because the Crown had the use of it, there are no special grounds in this case for allowing interest. I do not think any such general rule can be laid down."

For the same reason, his successor, Sir Henry Duke, in the case of the *Drottning Sophia and Other Vessels*[1] refused to approve an order of the Registrar made at the instance of the claimants that the proceeds of the sale of certain goods (amounting to about £85,000) be placed on deposit in the joint names of themselves and the Procurator-General or, alternately invested in government funds. Such an order, he said, would have the effect of making the public funds of the United Kingdom chargeable with interest in favor of the successful claimants of goods seized as prize, even though the case should prove to be one in which the Court did not think fit to award damages. Concluding, Sir Henry observed:

"Interest by way of damages can be awarded against captors under the general jurisdiction of the Court; but there is, I believe, no other ground on which such an award has been customarily made. The common form of order in past times where, between capture and release, sale took place, was, I think, an order of payment out of Court of the proceeds of sale,

[1] IX, *ibid.*, 290; III, *ibid.*, 659.

subject to any proper deductions in respect of costs or expenses. During wars when prize was, by statute or by Order in Council, granted to captors, an order for investment certainly could not have been made at the discretion of the judge without consent of the parties. Investment in a security of fluctuating capital value might have left captor or claimant exposed to serious risk of receiving a diminished fund, or of making good a diminution in value. Having regard to past practice, and to the effects which would follow the introduction of orders for investment of prize funds at the instance of either captors or claimants, I am not ready to introduce or adopt a novel procedure in this case. It is true that in the *Kronprins Gustaf Adolf*, the President ordered payment of interest by the Crown, but this was done under exceptional circumstances, as Lord Sterndale pointed out in the *Hallingdal*. With the exception of a long delay in bringing the case to hearing, for which I cannot hold the Crown to be in fault, there are no exceptional circumstances in this case, and the order appealed against must be set aside."

Sec. 491. The Same. German Decisions. The German Prize Courts allowed the claimants of goods which had been wrongfully seized, procedural interest (*Prozesszinsen*), in "virtue of the general principles of procedure, as compensation for the inevitable loss of time resulting from the trial and thus to indemnify the claimant who has won his case, for not having obtained his right since the filing of his claim." [1] In the case of a Dutch fishing vessel which had been wrongfully seized the Prize Court likewise allowed the claimant interest on the indemnity awarded, at four per cent from the date of the filing of the claim and, as in other similar cases, condemned the state to pay the costs of the proceedings.[2] The same conclusion was reached in the case where an indemnity was allowed for the destruction of neutral goods on a neutral vessel.[3] But claims for interest over and above *Prozesszinsen* for the period between seizure and the beginning of the trial were disallowed when there were justifiable reasons for the seizure and where consequently it was not a claim for damages (*Schadensersatz*) but for compensation for the value of goods seized (*Wertersatz*).[4] The rule appears to have been a reasonable one.

The French Prize Council regularly allowed claimants interest on the value of goods seized and restored, sold, or requisitioned, running from the date of the filing in the Prize Court of the first

[1] The *Morsö* (I *Entsch.* 272; Fauchille et De Visscher, 206). In this case the claimant was allowed interest from May 8, 1916, to the date of the decision, March 17, 1917.

[2] The *Sydney Albert* (I *Entsch.* 62; F. et De V., 43).

[3] The *Arena* (I *Entsch.* 343; F. et De V., 258), where the claimants were allowed 4 per cent interest from July 27, 1916).

[4] See, among others, the *Lestris No. 2* (II *Entsch.* 207) and the *Koningen Regentes* (*ibid.*, 242).

memoirs in their name,[1] sometimes from a later date (the date of the production of the *justifications complémentaires*) [2] and sometimes from an earlier date (for example the date when the goods would have arrived at their destination).[3]

In various cases, however, claims for interest were disallowed, as for example where although the seizure was held to be illegal, there were justifiable reasons for the seizure [4] or where the justifications in support of the claim were produced only subsequent to the decision of the Prize Council awarding an indemnity for the value of the goods and when the delay was due to the negligence of the claimant,[5] or where the claimant on appeal neglected to establish his rights as recognized by the Prize Council.[6]

IV

Miscellaneous Claims

Sec. 492. Claims for "General Average." The question of whether a captor of cargo takes it with the burden of a proportionate contribution to the general average loss incurred before capture, came before the British Prize Court the first time in the case of the *Sörfareren,*[7] where counsel for the shipowners claimed that they had sustained a general average loss from the vessel's having put into Pernambuco. Without deciding the question as to whether such a loss had been sustained in this case, Sir Samuel Evans referred the matter to the Registrar to determine the amount to be paid out of the proceeds of the cargo in case the shipowners were able to establish the existence of such loss. Regarding the nature of such claims Sir Samuel said:

"The nature of a claim for general average was described clearly by the Privy Council in the case of *Cleary v. McAndrew;* the *Cargo ex Galam* (1863), (2 Moo. P.C. (N.S.) 216, at p. 235), as follows: 'There remains the question of the claim for general average. On principle this claim seems to stand on the same reason as freight. It is a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute rateably. And for this claim the master

[1] See, among others, the cases of the *Jiul* (Fauchille, *Jurispr. Franc.*, 26), the *Eir* (*ibid.*, 88) and the *Karimata* (*ibid.*, 62).
[2] The *Jiul No. 2* (*ibid.*, 134).
[3] The *Kambangan* (*ibid.*, 102).
[4] The *Narrovian* (*ibid.*, 69), the *Rioja No. 2* (*ibid.*, 141), the *Teresa-Fabrigas* (*ibid.*, 148), the *Gorontalo* (*ibid.*, 72) and others.
[5] The *Gorontalo* (*ibid.*, 342, Council of State).
[6] The *Insulinde No. 2* (*ibid.*, 187, Council of State).
[7] IV Lloyd 174; I Br. & Col. Pr. Cas. 589.

who has incurred the expenses has a lien on the goods. It is a possessory lien at common law, by virtue of which he is entitled to hold the goods until his lien be satisfied.'

"And the Privy Council decided that the claim for freight and general average stood upon the same footing and had the first right against the funds in court.

"There is also a Statement by Lord Stowell in a case of prize in regard to the *Hoffnung* (1807), (6 C. Rob. 383; 1 Eng. P.C. 583) to the effect that cases of average on the part of the ship against the cargo were not infrequent in his time.

"On principle it appears to me to be right that where a claim of general average by the ship against the cargo exists before the cargo is captured the captors take *cum onere* of the cargo's contribution to the general average loss."

In the case of the *Cretic* [1] the owners of a British ship claimed before the Prize Court of Gibraltar damages for the unreasonable seizure and unwarranted detention of the ship and cargo (subsequently released), alleging that the damage sustained by detention for the purpose of unloading certain parts of the cargo rendered the cargo liable to a claim for particular or general average. The Court, however, held that the damage suffered did not arise from any act or default of the cargo owners and that their expenses were not voluntarily incurred for the general benefit of the ship and cargo so as to establish a claim for general average. But in the absence of reasonable cause for the seizure of the cargo in question resulting in the detention of the vessel, they were awarded damages and costs against the Crown. Sir Samuel Evans held in the case of the *Chateaubriand* [2] that the rules of prize law applicable to claims for freight and general average were equally applicable to claims for salvage. Accordingly where salvage services had been rendered to a French ship, the cargo of which had been seized and condemned as prize, a proportionate amount of the award for salvage and costs as was attributable to the cargo was allowed out of the proceeds of the sale.

Sec. 493. No Damages for Boats and Materials Wrongfully Seized as Maritime Prize in Interior of Country. As pointed out in an earlier section,[3] the British Prize Court, and on appeal the Judicial Committee, held in the case of the *Anichab and Other Vessels and Craft* [4] that the seizure on land by the military forces of certain craft which had been removed by the Germans from Luderitz Bay and Swakopmund into the interior

[1] III Br. & Col. Pr. Cas. 967.
[2] V Lloyd 24; II Br. & Col. Pr. Cas. 69.
[3] *Supra*, Secs. 52, 156.
[4] IX, *ibid.*, 118,132; III, *ibid.*, 611, 993.

of the country was not a subject of maritime prize and must therefore be released to the enemy claimants. But their claim for indemnity, damages, and costs, was disallowed. The claim was based on Article 53 of the Fourth Hague Convention which provides that such property may be seized but must be restored with indemnities at the end of the war. Lord Sterndale, however, held that this gave the Prize Court no right or duty to award an indemnity, since it was a diplomatic matter to be settled by the treaty of peace. He thought there was also another ground which he thus stated:

"It seems to me that wherever a captor brings articles into the Prize Court and asks for a condemnation of those articles which he has seized, if he has seized them wrongly and seized them as prize, this Court has jurisdiction to say, 'You seized those goods without any reasonable ground whatever, and having seized them without any reasonable ground whatever as prize, and brought them into Court as prize, the Court has jurisdiction to say that you must pay damages for doing it.' But in order to arrive at that conclusion, you must say that there could be no reasonable ground, not that it was wrong, but that there could be no reasonable ground, for seizure. I think the Courts have always been disposed to look rather narrowly at the case before they say that a captor has not had any reasonable ground for what he has done, because to interpret that too narrowly or too widely, whichever way you put it, would be to hamper belligerents very much in the exercse of their rights. I do not think this was an easy question. It may very well be that I am wrong in the conclusion to which I have come. But I cannot say that there was not sufficient doubt about this matter to give a reasonable ground for what was done on behalf of the Crown. The cases show that where there is a document difficult to construe, or a doctrine of law which is not very plain, a mistake in construing the document or interpreting the doctrine of law will not be considered as an unreasonable action on the part of the person who makes it, and I think that this case falls within that principle."

Sec. 494. Claim of British and Allied Nationals. In numerous cases claims were made before the British Prize Courts by British or allied nationals for damages, costs or expenses of various kinds in connection with enemy ships seized in British ports at the outbreak of the war and against which decrees of detention until further order were made. Thus in the case of the *Chile*,[1] where the Cardiff Railway Company claimed dock dues, Sir Samuel Evans said the only cases he was aware of in which such dues had been allowed were those where the captor had paid them. Although he made no order in their favor he gave them liberty to apply to the Court for payment. In the case of the *Marie Glaeser*,[2] a German vessel similarly seized in

[1] I, *ibid.*, 8; I, *ibid.*, 1.

[2] I, *ibid.*, 56; I, *ibid.*, 38.

port at the outbreak of the war, various claims were made by British subjects for disbursements and services rendered on account of the vessel. Sir Samuel Evans disallowed their claims, on the ground that under the law he had no right to allow them, although he said he had no doubt that where the claimants were British subjects their claims would receive due consideration from the Crown.

In the case of the *Juno*,[1] a British ship, claims were made by the owners for extra costs of discharging the goods at Swansea. Sir Samuel held that they should be allowed out of the proceeds of the condemned cargo. But in the *Cape Corso*[2] claims for demurrage and certain other expenses were dismissed, though reasonable extra claims for delivering the cargo in the more expensive port of London were allowed. In the case of the *Roumanian*[3] claims for demurrage and for coal consumed were disallowed, but claims for inspecting the cargo and charges for landing and storing the cargo (oil) were allowed. In the case of the *Tredegar Hall*[4] a claim for a sum in consequence of inconvenience and delay to the ship due to her diversion and for the extra cost of discharging the cargo were disallowed.

The same principle which was applied in the case of British claimants was equally applied where the claimants were allied shipowners[5] or were neutrals.[6] In the majority of cases all such claims were disallowed.

Sec. 495. Liability of Captor's Officers or Agents for Losses in Case of Breach of Duty. The question of the liability of captor's agents for losses attributed to breach of duty was considered at length by the Prize Court for Egypt and by the Judicial Committee of the Privy Council in the case of the *Südmark*,[7] a German vessel laden with goods belonging to certain British companies, to whom the goods were subsequently released. In the meantime, before being handed over to the marshal of the Prize Court and without any order from the Prize Court, they were discharged from the ship and stored in a customs warehouse (at Alexandria) and while stored there, were seriously damaged by fire. The owners claimed damages against the detaining officer who had discharged them and also against

[1] I, *ibid.*, 177; I, *ibid.*, 151.
[2] I, *ibid.*, 191; I, *ibid.*, 75.
[3] I, *ibid.*, 301; I, *ibid.*, 170.
[4] I, *ibid.*, 369; I, *ibid.*, 492.
[5] The *Eugene Schneider* (French vessel), I Lloyd 344.
[6] See notably the *Kafwyk* (II Lloyd 317; I Br. & Col. Pr. Cas. 282), where the claims of the owner of a Dutch vessel for demurrage and detention were disallowed.
[7] VI, *ibid.*, 343, 352; II, *ibid.*, 451; III, *ibid.*, 73.

the procurator and the general officer commanding the British forces in Egypt. The Prize Court for Egypt held that in discharging the cargo without reasonable cause, before the vessel had been handed over to the marshal and without authority from the Prize Court, the detaining officer had acted contrary to Article 16 of the Naval Prize Act of 1864 and the claimants were entitled to damages and costs against the captor and his agent, the detaining officer. That the detaining officer was ignorant of the fact that he was required to get an order from the Court before discharging the cargo and that he honestly believed that it was necessary for the safety of the ship to unload the cargo, was not admitted as a valid defense against the claim for damages. Neither ignorance of the law nor honest mistake, said the Court, could exonerate the captors if their ignorance and mistake have caused injury to innocent parties, the only exception recognized by the Prize Courts being cases where the construction of the law was "so unsettled and indeterminate that persons without legal training could not be expected to determine the course of law to be pursued." An array of cases was cited in support of this conclusion.

The Judicial Committee, however, reversed the decision mainly on the ground that in its opinion there was no necessity for the detaining officer to obtain authority from the Prize Court to discharge the cargo and that there was no obligation (on the part of the captor) to insure against fire for the benefit of cargo owners, whether the cargo is landed or retained on board.

After adverting to the duty of the Crown to preserve the property in order that it might be dealt with by the Prize Court, Lord Parker said:

> "But it makes no difference to the owners of the ship or cargo by whom the duty is discharged. For any loss occasioned by a breach of the duty the Crown may be made liable through the executive officer responsible for the breach or some other proper officer. As a matter of practice, it is quite common for the captors, under the orders of their superior officer, to hand the prize to some other officer of the Crown to be taken into a convenient port, and it is impossible to hold that such practice is contrary to international law. On the prize being so handed over, the duties of the captors themselves with respect to it are at an end, although the duty of the Crown remains."

As to the contention that an application to the Court for authority to unload the cargo was necessary, their Lordships were unable to accept it as a rule of international law, disregard of which would render the officer liable for a breach of duty.

Such a rule, they said, would not be in the interests of the owners; the circumstances might be such that prompt action is necessary in the interests of all concerned, and in such circumstances the officer who has custody of the property must act on his own responsibility. "If there was no justification for the landing of the cargo and the owner is prejudiced thereby, he has his remedy in the Prize Court. If the landing of the cargo is justified, the owner has no cause of complaint. The irregularity, if any, committed by the responsible officer for the landing in not having first obtained the leave of the Court, is in that case a mere technical breach of duty." The Judicial Committee added that even if there had been a breach of duty by the detaining officer it would be difficult to see how the damage subsequently incurred by reason of the fire was in any way a consequence of such breach.

In the case of the *Santa Catharina*[1] the Prize Court, and on appeal the Judicial Committee, disallowed a neutral claim against the captor for the loss of a ship and cargo which while in the custody of the captor caught fire as a result of spontaneous combustion and were totally destroyed. The ship was laden with coal and was captured in a hot climate and there being no Prize Court near at hand and it being impossible to spare a prize crew she was left unattended for a time without even a watchman on board, during which the fire broke out. The claimants contended that the loss was due to the negligence of the captors. The Prize Court, however, held that since there was no reason to expect imminent danger to the cargo or that if a single watchman had been left on board he could have stopped the fire, there was no evidence of negligence. The decision of Lord Stowell in the *Maria* and in the *William* were relied on as authority for the rule that captors are not insurers of ships and cargoes in their possession and that their liability for loss in such cases exists only where there is negligence. Sir Arthur Channell in delivering the opinion of the Judicial Committee affirming the judgment of the Prize Court said:

"Whilst it is right, as Lord Stowell points out, to hold captors liable for any 'deficiency of due diligence,' it is not right to require them, at a time when they have paramount duties to attend to, to take every possible precaution which, judging after the event, may seem to have been desirable."

[1] VIII, *ibid.*, 35, 46; III Br. & Col. Pr. Cas., p. 367.

Similarly in the case of the *New Sweden,*[1] where goods had under the Reprisals Order been seized at Kirkwall in the parcels mails of a neutral vessel and while being forwarded by rail to London for examination were destroyed or damaged by fire, the Prize Court held that the Crown officials who detained and forwarded the goods were not liable to the owners for the loss. There was no obligation on the captor, the Court held, to insure the goods, and as the Crown officers had acted reasonably in sending the goods to London for examination and had been guilty of no negligence or misconduct in connection therewith the claims for damages against them must fail. The decision was affirmed, on appeal, by the Judicial Committee. Regarding the responsibility of captors for the care of goods seized and detained by them, Lord Sumner said:

"There has been from time to time some difference of opinion as to the exact degree of care which is required of captors, but their obligation has always been recognised as being one of care and prudence. It has never been placed so high as that of insuring, or answering in all events for, the safety of the prize, whether by protecting it from all hazard or by providing through policies of insurance a fund to make good its loss. The law is now well settled that it is for unreasonable action, for negligence and for wilful wrongdoing, that captors are liable from the time of seizure to the time when the *res* is placed in the custody of the Prize Court. If the obligation went beyond that of reasonable care and abstention from wilful wrong, most of the discussions and decisions on this subject would have been wholly beside the mark. There is neither principle nor authority for placing the responsibility of those who exercise a lawful right of search, or act in accordance with the terms of a Reprisals Order any higher than that of actual captors."

As to the non-existence of an obligation on the part of the captor to effect insurance against fire for the benefit of cargo owners whether landed or on board the ship the Judicial Committee repeated and reaffirmed what it had already said on this point in the *Südmark* (*supra*).[2]

[1] VI, *ibid.*, 257; III, *ibid.*, 984, 1000.

[2] As a matter of fact the marshal of the Prize Court usually effected insurance on goods detained under the Reprisals Order when they passed into his custody and it was argued in this case that if the goods had been delivered into his custody at Kirkwall, as they should have been, policies of insurance would have automatically operated. In the case of the *Cairnsmore* and the *Gunda* (IX Lloyd 365, 374), where the cargoes while awaiting adjudication were insured by the marshal against fire and aircraft risk under a floating policy which covered the ships or cargoes seized at sea, and which were released to the claimants, the Prize Court held and it was affirmed by the Judicial Committee that the claimants were not chargeable with the cost of the insurance.

Sec. 496. Liability of Captor for Damages Caused by Third Parties When Seizure Not Justifiable. The liability of a captor for damages sustained by a neutral vessel in consequence of an attack on it by an enemy submarine while the vessel was being taken in for search came before the British Prize Court in the case of the *Elve* and the *Bernisse*.[1] These were Dutch vessels which while on a voyage from Rufisque to Rotterdam were stopped by a British warship at a place west of the Orkneys outside the German war zone within which the German government had announced its intention of sinking all neutral vessels, and not having the "green clearance" required by the British Reprisals Order, were ordered to put into Kirkwall for further examination. The captains of both vessels protested that they would have to go through the German war zone where they were liable to be torpedoed by German submarines. To this remonstrance the commander of the warship replied that they were as likely to be sunk outside the war zone as in it, and, consequently, it made no difference whether they were obliged to traverse the interdicted zone or not. During the voyage through the war zone the *Elve* was in fact torpedoed and sunk by a German submarine and the *Bernisse* was attacked and seriously damaged by another. The owners having demanded compensation and damages for their losses, the Prize Court held that there was no reasonable ground for seizing and sending the vessels in; that an honest doubt on the part of the captor as to the meaning of the Reprisals Order was not sufficient to relieve him from liability and consequently the owners were entitled to the compensation claimed. The judgment was affirmed by the Judicial Committee. The Court rejected the contention of the Crown that there was no liability unless the sending of the vessels through the German war zone exposed them to greater danger than they would have incurred had they not been sent through the zone. If, it said, the Crown had no reasonable ground for seizing and diverting the vessels from their course it was a wrongdoer and it could not be relieved from liability by pleading the wrongful or criminal act of a third party. The Court had no hesitation in saying that in its opinion the danger to which the vessels were exposed in the war zone was in fact much greater than outside of it and the absence of a "green clearance" was not a sufficient reason for sending the ships into Kirkwall. The Judicial Committee in affirming the judgment admitted that effective search at sea was

[1] IX Lloyd 243, 256; II Br. & Col. Pr. Cas. 517; III, *ibid.*, 771.

impossible in many cases and that it was especially so in this case, but it pointed out that the captor did not suspect the concealment of contraband in this case and that the real reason why the vessels were taken in was because they did not carry the "green clearance" required by the Reprisals Order. The second and more important point on which the Crown relied was that there had been an honest doubt on the part of the officers who ordered the vessels to be sent in, as to the true meaning of the Order in Council. Regarding the sufficiency of this doubt as a justification Sir Arthur Channel speaking for the Judicial Committee said:

"The question as to what is sufficient to relieve a captor from paying damages in respect of a capture which is afterwards denied to be in fact wrongful was very fully considered in the case of the *Ostsee*. It was there held that, to exempt captors from costs and damages, there must be some circumstances connected with the ship or cargo affording reasonable ground for belief that the ship or cargo might prove a lawful prize. That case arose during the Crimean War, and the cases down to that date were very fully dealt with. The only case which at all supports the contention put forward by the Crown in the present case is the *Luna*. There a neutral vessel proceeding to St. Sebastian, in Spain, which had at the time been for two years in the occupation of the French, was seized for alleged breach of blockade by British captors who were in *bona fide* doubt whether or not an Order in Council of April 26, 1809, declaring a blockade of "ports and placed under the Government of France" extended to St. Sebastian so temporarily in French occupation. Sir William Scott held that it did not so extend and decreed simple restitution, and he not only refused the claimants costs and damages but gave the captors their expenses."

But, His Lordship added, five years later Sir William Scott in the case of the *Acteon* (2 Eng. P. C. 211) laid down a different rule. If the decision in the *Luna* proceeded entirely on the ground stated in the judgment, as reported, it was contrary not only to the decision in the *Ostee* but to his own judgment in the *Acteon* and could not now be followed.[1]

Sec. 497. Claims of Captain and Crew. In many cases, especially where vessels had been destroyed, claims for damages were made before the Prize Courts by the captains or crews for the personal losses which they had sustained, on account of loss of employment, loss of their personal effects, etc. The German Prize Court uniformly held that under Article 115 of the prize

[1] This decision has been criticized as a "harsh" one, on the ground that it makes captors the insurers of property seized by them, against the illegal acts of other belligerents and not merely against the ordinary perils of the sea and negligence on the part of the captor. *Brit. Yr. Book of Int. Law*, 1921-22, p. 202).

ordinance where a neutral vessel was unlawfully destroyed only the owners of the vessel or the cargo were entitled to claim damages and not the captain or crews; on the other hand while under Article 8 of the prize ordinance they were entitled to compensation where the validity of the capture was not upheld by the Prize Court they were denied compensation when justifiable reasons for the seizure were held to have existed.[1] But where justifiable reasons were held not to have existed the German Prize Courts recognized the validity of claims for losses actually sustained by the captain and members of the crew, though not for fixed sums.[2] The French Prize Council held that where an enemy ship had been sunk by the French naval forces for the exceptional reasons referred to above the personal effects of the captain and the crew must be restored, if they were still in existence, but that if they were destroyed with the ship the owners were not entitled to an indemnity covering their value.[3]

[1] See, among others, the cases of the *Cocos* (I *Entsch.* 141) and the *Semanthe* (*ibid.*, 188).

[2] Among others, the *Trudvang*, the *Storesand*, and the *Draupner* (I, *ibid.*, 276, 298, and II, *ibid.*, 162).

[3] The *Mahrousseh* (Fauchille, *Jurispr. Franc.* 147).

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